OVERSIGHT HEARING ON EEOC's PROPOSED MODIFICATION OF ENFORCEMENT REGULATIONS, INCLUDING UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

HEARING

BEFORE THE

SUBCOMMITTEE ON
EMPLOYMENT OPPORTUNITIES

OF THE

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HOUSE OF REPRESENTATIVES

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OVERSIGHT HEARING ON EEOC'S PROPOSED MODIFICATION OF ENFORCEMENT REGULATIONS, INCLUDING UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

WEDNESDAY, OCTOBER 2, 1985

House of Representatives,
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2257, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the subcommittee) presiding.

Members present: Representatives Martinez, Williams, Hayes, Gunderson, and Hawkins (ex officio).

Staff present: Eric P. Jensen, acting staff director; Paul Cano, assistant staff director; Genevieve Galbreath, chief clerk and staff assistant; Valerie White, legislative assistant; Dr. Beth Buehlmann, minority staff director for education, and Mary Gardner, minority legislative associate.

Mr. Martinez. The hearing will come to order.

This is an oversight hearing of the EEOC's proposed modification of its enforcement regulations including the uniform guidelines on employment selection procedures.

Today, the Employment Opportunities Subcommittee is honored to have before us the Chairman of the Equal Employment Opportunity Commission, Mr. Clarence Thomas, for this oversight hearing on proposed modifications of enforcement guidelines for employment discrimination.

Chief in our concerns for today's hearing is the proposed modification of the uniform guidelines on employment selection procedures, which regulate how testing devices are used to hire, promote, train, and award workers without discrimination. The guidelines are founded upon the principles enunciated in several Supreme Court cases, *Griggs* and *Albemarle,* in particular, which incorporate the use of statistical measures to determine adverse impact upon minorities and women workers by the use of testing devices.

When adverse impact is found, then companies must show that their tests are job-related. If they fail in this proof, called validation, then they must redevise tests to pass the validation review.

To determine adverse impact, statistical measures and rules are applied to permit administrative discretion in seeking enforcement of title VII action for discrimination.

The uniform guidelines on employee selection procedures has been found universally to be a highly successful tool for eradicating discrimination in employment practices, used to exclude women and minorities from employment and promotions.

Today the subcommittee will be raising many important questions, including why these successful guidelines and tools are being tampered with, in fact, with an eye to doing away with crucial tools such as the use of statistical measures used to establish the adverse impact test of discrimination. I am concerned that the agency is proclaiming itself the final arbitrator of the plain meaning of the term discrimination, when Congress and the courts have firmly established what those definitions, principles, and remediation policies shall be. There is no room for debate on these issues. Yet, this agency is creating confusion with its pronouncements and proposed modifications, which challenge the bipartisan efforts of previous lawmakers in this area to rid the workplace of systemic discrimination.

I have a final concern. The process which this agency is applying to modify a broad collection of solid and crucial guidelines on enforcement policies is occurring without the procedural due process required to allow segments of the public, Government, and the Congress a participation in these considerations. These deliberations and draftings are being done in total secret without even the participation of the professional psychologists involved in this field. I trust that this perception by the public will be altered by the comments of the Chairman here today.

Mr. Thomas, I hope that you will assure the subcommittee that Congress will have an ample opportunity to review the UGESP proposal before the Commission brings the matter up for a final vote.

Welcome today. Mr. Thomas, would you come forward?

While Mr. Thomas is taking his seat, I would like to ask Mr. Hawkins, chairman of the full committee, if you have any statements at this time?

Mr. **Hawkins**. No statements at this time.

Mr. **Martinez**. Mr. Hayes.

Mr. **Hayes**. No statement.

Mr. **Martinez**. Mr. Gunderson.

Mr. **Gunderson**. Just very briefly, Mr. Chairman, I would like to join with you in welcoming Chairman Thomas. I think we have had previous hearings on this issue. Unfortunately, Mr. Thomas was unable to attend those particular hearings. So if by chance his presence can provide us some insight that wasn't received at those, it is certainly worthwhile.

I don't think the fact that there has been some discussions about reviewing the uniform guidelines is anything new. I understand that the decision to begin looking at this issue was made by the Commission last June.

I must say that I am not concerned that they are looking into this. I am not critical of any agency in the Government for reviewing anything they have done in the past. I think that that in and of itself is legitimate and I would hope that we on this subcommittee don't jump to conclusions either until those final decisions are or are not made.

With that, however, if Chairman Thomas can give us some insight and allay some fears that are existing, rightly or wrongly, in the eyes of some people within the civil rights community, then this exercise is a worthwhile one.

So, with that, Chairman Thomas, and Mr. Chairman, I look forward to the testimony.

Mr. **Martinez**. Mr. Thomas.

STATEMENT OF HON. CLARENCE THOMAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. **Thomas**. Thank you.

Good morning, Chairman Martinez, Chairman Hawkins, members of the subcommittee. I would like to first indicate that the members of the Commission present here today—the other four Commissioners, Commissioner Gallegos, Commissioner Silverman, Commissioner Webb, and Commissioner Alvarez, in addition, we have the acting general counsel, Johnny Butler.

Over the past year, the Commission has demonstrated its firm commitment to equal employment opportunity. We believed the charging parties who were discriminated against should receive more than they were receiving.

So we did something about it. We unanimously adopted a remedies policy which squeezes as much relief out of title VII as possible. We saw that giving charging parties who had suffered discrimination a right to sue letter and a pat on the back was an abdication of our responsibilities.

So we adopted an enforcement policy under which we will defend their rights, not send them packing. The results are nothing short of phenomenal with a tremendous increase in the number and quality of cases.

We saw that our systemic program, though bulging with resources was languishing in uninvestigated charges. Again, we took action. We are just now beginning to see the results.

Within the past week the Commission unanimously approved for litigation five systemic cases based on Commissioners' charges by our predecessors. When we came to the Commission we were told that the job of a Commissioner was essentially a do nothing job. We have changed that.

We are a collegial body. We personally develop and draft policy and we review each case for litigation authorization. Although not without vigorous debate, the major policy pronouncements have been unanimous, a clear indication that the policies represent the very strong consensus of the Commission.

More often than not, the lead role in the develop of the policies has been taken by a Commissioner other than myself. We have committed ourselves both individually and collectively to making this agency work.

This has not been easy with the constant and unfounded harangues from naysayers, detractors, and cynics. But the improvements in the agency and the tremendous increase in litigation, the record monetary awards, the return to full investigation, and the emergence of a sustained systemic program, inter alia, are sufficient reward for us.

Again, look at what we do. The record speaks for itself. The pervasive rhetoric to the contrary, notwithstanding. It appears, however, that the record of the agency is less an issue than my personal views. This has been particularly true with regard to the uniform guidelines which the Commission unanimously voted on June 12, 1984 to review.

There has also been a nonsensical and ludicrous formulation of a preelection and postelection Clarence Thomas. This is so absurd as to be laughable.

It should be noted ab initio that GAO urged that the guidelines be reviewed 2 months after I became Chairman. Other cosignatories also urged review. I resisted essentially because I had other things to do.

My own view has been and continues to be that the guidelines are too complicated, appear to be a full employment program for testing psychologists and labor lawyers, and more importantly, are falsely premised on the assumption that certain minorities cannot perform as well as whites.

It is my view that if the performance can be corrected by preparation, then do so. If it results from some immutable characteristic such as inherent inferiority or, euphemistically, cultural bias, then defend that assumption. But to make it as clear as it is already, as it already is to all who have bothered to inquire rather than indict, I will not support any policy which is premised on the inferiority of my race.

We as a Commission will review the uniform guidelines in total compliance with the Administrative Procedures Act and the Sunshine Act. I have also committed myself to appearing before this subcommittee to discuss the Commission's proposals. To date, there are none. We are preparing the background documents in order to facilitate a thorough review and to leave a paper trail. The rhetoric is diverting a great deal of valuable energy and time.

I guess we all have our Iagos. But no matter how loud the rhetoric gets, we will continue to do the best and most professional job we can.

[The prepared statement of Clarence Thomas follows:]

PREPARED STATEMENT OF CLARENCE THOMAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Good morning, Mr. Chairman and members of the subcommittee. As requested, I will provide the subcommittee with an update on the Status of the Equal Employment Opportunity Commission's review of the uniform guidelines on employee selection procedures ("UGESP"), the management directive 707, section 501 of the Rehabilitation Act, proposed changes to the Equal Pay Act interpretations, as noted in the Commission's semiannual regulatory agenda, and EEOC's enforcement activities, including the modifications to the administrative charge processing procedures and litigation program.

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

I was sworn in as Chairman of the Equal Employment Opportunity commission on May 17, 1982. As I have mentioned several times in testimony before this committee and other committees of Congress, upon my arrival at the Commission there were several general accounting office reports awaiting my attention. Several of these reports, as well as various reports from committees of Congress, had condemned the agency as being an administrative and managerial disaster. Two months later, in July, 1982, the General Accounting Office issued a report recommending a review and revision of the uniform guidelines on employment selection procedures.

Soon after the issuance of that report, there was a tremendous lobbying effort by various constituency groups urging me to take immediate action on GAO's recommendations regarding UGESP. I refused to do so.

To review UGESP, although important, was not an immediate priority, at that time, given the administrative problems facing the Agency. Therefore, the Commission took no action regarding UGSEP until March 15, 1983. At that time, the Commission voted to review the recordkeeping portions of UGESP. Then on June 12, 1984, the Commission voted to have the Commission's office of legal counsel prepare a notice of proposed rulemaking for the purpose of clarifying the current UGESP recordkeeping requirements. At that time, the Commission also voted to announce hearings that would be held on the recordkeeping changes, as required by section 709(c) of title VII of the Civil Rights act of 1964, as amended. The Commission also voted to invite the public's comment as to whether or not the proposed changes in the recordkeeping requirements would effectuate the purposes of title VII.

Consistent with the Commission's general practice of reviewing and reexamining its regulations and guidance, and because the recordkeeping requirements of UGESP were already under review, on July 31, 1984, the Commission unanimously voted to review UGESP in its entirety.

In February 1985, in accordance with Executive Order 12498, I outlined for the Office of Management and Budget, the significant regulatory activities that I intended to undertake, as chairman of the Commission. This outline reflected, among other things, the Commission's pending review of UGESP.

On September 17, 1985, the commission approved its semiannual regulatory agenda pursuant to Executive Order 12291 and the regulatory flexibility act. As noted in the semiannual regulator agenda, the Commission intends to pursue 15 current and proposed rulemaking initiatives. The Commission also has 6 regulations under review, including a review of UGESP.

The guidelines were adopted in 1978 by EEOC, the Civil Service Commission, Department of Justice, Department of Labor (Office of Federal Contract Compliance Programs) and Department of Treasury (Office of Revenue Sharing). It is interesting to note, once again, that 2 months after my swearing in, the General Accounting Office (GAO) issued a report in which the GAO recommended that "EEOC initiate a review of the guidelines and revise them" The GAO said that this effort should include examining the problems associated with (1) collecting and maintaining adverse impact data, (2) searching for alternatives during validation, and (3) the relationship of merit laws to the guidelines; and determining how to make the guidelines more understandable to their users.

The GAO also recommended, "consistent with EEOC's responsibilities under the Executive order" that the review and revisions be made in consultation with others with special expertise. Therefore, it is also interesting to note that the Department of Justice commented to the GAO that it agreed that the guidelines should be reviewed. Similarly, Dr. Benjamin Schneider, in testimony on July 18, 1985, representing the American Psychological Association, before the Education and Labor Subcommittee on employment opportunities, stated that the guidelines fail to represent good contemporary practice and should be revised.

Recently, the office of legal counsel staff was directed by me to provide the Commission with an overview of UGESP; which would give the Commission the history and evolution of UGESP; any relevant case law; the scope and methodology; an analysis of the law regarding adverse impact; a discussion of the various questions that have been raised. Both within the Commission and by outside commentators, regarding UGESP; and recommendations as to whether, and how, UGESP should, if necessary, be revised. Although the office of legal counsel submitted, in July 1985. A staff document regarding UGESP, that document did not adequately set forth the analysis which the Commission is seeking. As of this date, there is still no document which the Commission has reviewed or adopted. The staff is still working to produce such a document.

In the September 17, 1985, adoption of its semiannual regulatory review, the Commission did not set a target date for completion of its review of UGESP. We anticipate that it will be an on-going project, that will necessarily result in an ample opportunity for public and interagency comment.

As of this date, the current guidelines remain in effect.

MANAGEMENT DIRECTIVE 707

UGESP is applicable to all employers: private firms, State and local governments, and the Federal Government. Federal agencies, however, are guided also by EEOC management directive 707 (MD 707).

In October 1984, the Commission unanimously voted to review its assignment under section 717(b) of the Civil Rights Act of 1964, as amended, to issue rules, regulations, orders, and instructions to assure that each Federal agency "maintain(s) an affirmative program of equal employment opportunity." It is particularly necessary for the Commission to now examine its policy in this area because EEOC's MD 707, which constitutes the Commission's current instructions to Federal agencies on this subject, applies only through fiscal year 1986. The Commission must, therefore, soon establish and issue to agencies, specific rules, regulations, directives, instructions, etc., as necessary to effectively comply with the requirements of section 717(b). The Commission is now reviewing management directive 707.

SECTION 501 OF THE REHABILITATION ACT

Before responsibility for section 501 was transferred to the Equal Employment Opportunity Commission (EEOC) in 1978, there had been a slight downward trend in the numbers of handicapped individuals working in the Federal work force.

The Commission is processing an increasing number of complaints alleging handicap discrimination by Federal agencies in violation of section 501 of the Rehabilitation Act of 1973. Our review of these complaints, our communications with other Federal agencies, and the state of judicial case law on this subject matter indicates that there are at least two major issues where the Commission's existing regulations are inadequate, and further guidance is necessary: (1) the appropriate definition of handicapped individuals who are protected by Federal statutes from discrimination and/or on whose behalf affirmative action is to be undertaken: and (2) the extent to which an agency must accommodate these individuals' disabilities.

The Commission's regulations contain a very general definition of "handicapped person." This definition has been subject to a wide array of interpretations. Most of these interpretations have related to the definition's use of the phase "substantially limits one or more major life activities" in describing the nature of the physical or mental impairment that brings a person within the definition.

The regulations also require that Federal agencies provide reasonable accommodation to otherwise qualified handicapped applicants and employees, but provide little guidance beyond listing some of the factors that should go into deciding whether a particular accommodation is reasonable and would not impose an undue hardship on the operation of the agency. The Commission is currently reviewing these issues.

EQUAL PAY ACT INTERPRETATIONS

In 1965, the Department of Labor (DOL), which was then responsible for enforcing the Equal Pay Act of 1963, issued a set of interpretations of the act. DOL amended its interpretations in 1967.

Between 1967 and 1979, the Fair Labor Standards Act, of which the Equal Pay Act is an integral part, was amended 3 times. There were also a number of court decisions, including *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), rejecting our questioning aspects of DOL interpretations. Therefore, in 1979, when the EEOC received responsibility for enforcing the Equal Pay Act, the Commission declared (44 FR 38671) that while it was not adopting the DOL interpretations, until the EEOC issued its own interpretations employers could continue to rely upon the DOL interpretations "to the extent that they are not inconsistent with statutory revisions and judicial interpretations."

The EEOC's 1979 notice is not published in the Code of Federal Regulations with the DOL interpretations. Therefore, a person reading those interpretations, might mistakenly think they may be relied upon in their entirety. Moreover, the EEOC has never indicated which provisions of the DOL interpretations it considers to be inconsistent with statutory revisions and judicial interpretations." Thus, not even employers and employees who are aware of the 1979 notice have any reliable guidance concerning the EEOC's interpretation of their obligations and rights under the Equal Pay Act.

The following alternative solutions have been identified:

1. The Commission could issue a new interpretative regulations. The advantages of this alternative would be that employers would have the EEOC's interpretation of the statute, the prior DOL regulations would be updated to reflect statutory changes

and judicial development, and, the EEOC's interpretations would be widely disseminated and readily available to employers. Regulations would benefit the EEOC to the extent that compliance is more easily or quickly achieved. The regulations would not impose any costs not imposed by the statute itself.

2. The Commission could issue a statement of enforcement policy, instead of interpretative regulations. The advantage of this alternative is that employers would be apprised of the enforcement agency's interpretation. The disadvantages are that the DOL's regulations might still be in the Code of Federal Regulations and the EEOC's enforcement policy might not be as widely disseminated or readily available to employers as interpretative regulations would be.

3. The Commission could announce that the DOL regulations can no longer be relied upon without issuing anything to replace them. The advantage would be that it is the least costly alternative for the EEOC to implement. The disadvantages are that employers would not have general guidance from the enforcement agency, the agency's enforcement efforts might be slowed by case-by-case development of policy and precedent, and employees might not be aware of their rights.

New regulations would offer employers greater certainty concerning how to comply with the Equal Pay Act. Thus, they would eliminate the costs associated with the present risk of unintentional noncompliance.

The Commission, in adopting its semiannual regulatory agenda on September 17, 1985, proposes to issue interpretations regarding the enforcement of the Equal Pay Act that would replace those issued by the Department of Labor appearing at 29 C.F.R. Part 800.

MAXIMIZING THE IMPACT OF EEOC'S ENFORCEMENT ACTIVITIES

The Committee has also inquired about the Commission's administrative charge process, enforcement and remedies policies.

The reorganization of 1982 has has enabled the Commission to launch a stronger offensive toward enforcing the employment statutes. In 1982, the Agency's administrative enforcement programs were consolidated under the office of program operations. This facilitated a major effort to eliminate the "backlog" charges filed prior to January 1979 which continued to plague EEOC's workload. Between June 1982 and October 1983, the Commission's overall "backlog" inventory was reduced from approximately 12,000 to 782 charges. Presently, all of the remaining charges are either awaiting decisions, are at the subpoena enforcement stage, or are being processed in conjunction with systemic charges or as early litigation identification charges. A program has also been implemented to prevent recurring build-up. It is designed to reduce the number of charges over 300 days old. The Commission received 66,461 new charges and complaints in fiscal year 1983; a 30 percent increase over fiscal year 1982. Despite this substantial increase, less than 5 percent of the agency's inventory was over 300 days old at the end of fiscal year 1983. The average processing time was reduced to 155 days. In fiscal year 1984, the Commission received 63,132 charges to process, 5 percent less than fiscal year 1983. However, title VII charge receipts increased by 3 percent. Only 3 percent of the agency's inventory was over 300 days at the end of fiscal year 1984. The average processing time remains at 181 days overall. Needless to say, eliminating the "backlog" inventory has aided the Agency's ability to concentrate on current employment discriminaiton disputes.

MODIFICATIONS IN ADMINISTRATIVE CHARGE PROCESSING PROCEDURES

In a GAO report to Congress, dated April 9, 1981 (#HRD-81-29), the GAO, in discussing EEOC's rapid charge process, informed Congress that the "EEOC's actions may be thwarting its efforts to eliminate employment discrimination" by "overemphasing" settlements. Therefore, after a thorough review, the EEOC, in December, 1983, adopted a new approach to charge processing which should result in an increase in quality cases for litigation, and a greater number of comprehensive conciliation agreements. The Commission's heavy use of the rapid charge process had fallen under criticism due to the perception that too many claims were being settled without adequate investigation and complete relief. Since 1979, all incoming claims of alleged discrimination had been automatically channeled through the rapid charge process which was designed to resolve disputes by mutual settlement rather than litigation.

Determined to strengthen its law enforcement capabilities, the Commission has now shifted its emphasis away from rapid charge toward thorough investigation of complaints, and subsequent action based on the potential merit of each claim. The new system allows charges to be processed in an expeditious and effective manner that provides appropriate relief.

I am fully aware that by moving to full investigations we run the risk of an aging case inventory. However, unlike in prior years when the great backlog developed, we now have tracking systems and controls which will alert us to any problems before they get out of hand. We also build inventory age projections into our budget. So, the status of our inventory is not only before us, but also before Congress and OMB. The inventory is aging more rapidly than I would like, but we will address that.

Equally important, we have emphasized the training of our personnel in all areas in which we have enforcement responsibilities. Previously, they were only knowledgeable in very specific areas. As a result, we had very little flexibility in moving personnel to areas with the greatest need. Over the past 2 years, we have increased our expenditures on training 5-fold.

MAXIMIZING THE LITIGATION PROGRAM

The Litigation Enforcement Program has been a highly successful component of the EEOC'S activities. The number of suits filed increased substantially. The quantity and quality of cases filed also has been substantially improved. Record levels of monetary benefits for victims of discrimination have been recovered, and the supreme court and appellate courts have made favorable rulings in cases of far-reaching importance to the Commission's continued fight against employment discrimination. In fiscal year 1983, litigation was authorized in 192 new enforcement suits, a 71 percent increase over fiscal year 1982. In fiscal year 1984, the Commission filed 222 new enforcement suits, a 14 percent increase over fiscal year 1983. The Commission expects to file substantially higher number of cases during fiscal year 1985; the end of the first half of fiscal year 1985 exhibited a 19.7-percent increase in the number of cases approved over the first half of fiscal year 1984. Similarly, the Commission filed 109 cases during the first half of fiscal year 1985, a 14.7-percent increase over the 95 cases filed during the same period in fiscal year 1984.

Too often, though, the EEOC's effectiveness is measured solely by the number of cases being filed. Although the Commission continues to initiate larger numbers of lawsuits, including sex-based wage discrimination lawsuits, greater emphasis is being placed on improving the quality and nature of the cases brought to trial.

In addition, a statement of enforcement policy was adopted in September 1984. The Commission believes that 2 critical features of a Law Enforcement program are certainty and predictability of enforcement in those situations where there is reason to believe that a law EEOC enforces has been violated. Therefore, the Commission has adopted the goal of considering for litigation each case in which merit has been found and conciliation has failed. The Agency's legal and investigative resources will be directed to facilitate this effort. In fiscal year 1984, only 525 of 2,128 cause determinations resulted in successful conciliations. District directors are now required to forward to the Commission all cases in which a statutory violation has been found and conciliation attempts have failed. The Commission will then review each such case and determine whether to initiate litigation.

Under the system which we inherited, after a case had failed conciliation, it passed through countless levels of review before a recommendation was made to the full commission to authorize litigation. Essentially, our legal and compliance staff were required to determine whether a charge in which we have found discrimination was worthy of litigation. Of the 1,603 charges which failed conciliation in fiscal year 1983—only 284 were actually brought before the full Commission seeking authorization for litigation. Some of the charges were against public sector employers, for which the Commission has no title VII litigation authority. Presumably, the other charges were not worthy of the Commission's time and effort. To short circuit this problem, we adopted an enforcement policy which states that every case in which a reasonable cause determination or letter of violation has been issued will be forwarded to the full Commission for litigation authority. Presumably, the other charges were not worthy of the Commission's time and effort. To short circuit this problem, we adopted an enforcement policy which states that every case in which a reasonable cause determination or letter of violation has been issued will be forwarded to the full Commission for litigation consideration. Stated another way, we intend to enforce our findings—no matter how small the case is. This is a profound departure from the pick and choose approach.

REMEDIES POLICY

In the past, the Commission has chosen to concentrate on prospective relief in the form of numerical goals and timetables, rather than full relief for the party actually filing the charge. I find it ironic that anyone would put a policy in place which provided less for those who were actually hurt than for those who may have been hurt as a result of historical events. To correct this imbalance in priorities, the Commission has approved a policy statement which sets the remedies which our staff must seek for charging parties. This policy requires, among other things, that:

1. All employees in the affected facility be notified of their right to be free of unlawful discrimination;
2. Corrective action be taken to ensure that similar violations not occur;
3. Each discriminatee be unconditionally offered placement in the position he or she should have occupied, but for discrimination;
4. Full monetary relief; and
5. The discriminating employer must agree, or be ordered, to cease any further unlawful employment practices.

The bottom line is that we intend to obtain the maximum relief available under the statutes to make the charging party whole, and to eradicate the discriminatory conduct.

CONCLUSION

The committee continues to ask for my personal views on issues. I have been candid, and not timid, in expressing my views. Nevertheless, I cannot emphasize strongly enough that the Commission acts as a body.

The Commission is reviewing the uniform guidelines, the management directive, and the other proposed areas of review in a methodical, thoughtful manner, because we believe that the best, most complete, research is required. All alternatives will be carefully considered; and a clear paper trail of the Commission's deliberations and activities will be established before the Commission announces its recommendations.

Furthermore, the Commission does not act in isolation. Whatever actions the Commission may ultimately propose on any issue, will have benefit of public comment and the interagency coordination process. However, only the Commission has the ultimate responsibility and obligation to review, and perhaps revise, existing Commission policies.

Title VII is a dynamic area of the law. I think it is fair to say what others have noted, that title VII, at age 20, is a far more complicated law than Congress envisioned when it passed the legislation in 1964. For example, the congressional debate in 1964 did not address how a charge is to be proven; sexual harassment; comparable worth; the presumptive right of a successful litigant to backpay and full make whole relief; the effect of title VII on non-title VII claims; the award of retroactive seniority to unlawfully rejected job applicants; the duty of an employer with a disability plan to fund pregnancy related absences, or the effects of seniority systems that perpetuates the effects of past discrimination—just to name a few issues.

It is necessary and appropriate, therefore, for the Commission to regularly review and reexamine its policies, regulations and approaches with respect to title VII as well, as all the statutes we enforce. As we have done in the past, we intend to continue to carry out our responsibilities in a methodical, well-reasoned, fair and consistent manner. And in this manner, we intend to pursue the goal we all share—to strengthen title VII, to vigorously enforce the law, and to eliminate the remaining barriers to equal employment opportunity.

I will be happy to answer any questions you may have.

Mr. MARTINEZ. Thank you, Mr. Thomas.

I have several questions, and they deal generally with the perception that there is something going on and something being done over there that we are not being kept abreast of.

Mr. Gunderson in his opening statement said that he finds nothing wrong with reviewing the regulations and guidelines. And I have to agree with him; I don't either. The thing that I have a problem with is that this seems to be being done in secret.

I would like you to address that one perception that many of us have right now. Are these being done in secret? Is there some reason why this subcommittee can't have a disclosure of what you are doing, what you are studying, what you are considering doing?

Mr. THOMAS. I don't have the slightest idea of what you are talking about. We have turned over everything that we have to GAO. We do not have secret meetings. I don't have the slightest idea what the rumor mill has or the rhetoric mill has or what ghosts and goblins they have created out there.

We have had drafted and are preparing one background document. We could have just as easily taken off earlier with some preconceived notions about the guideline and develop something. It has been our position and continues to be our position that we should not only review policies in depth when we do review them, but that we leave a paper trail which we did not have the benefit of in any of our major policy areas for our successors and for any individuals who would care to do research.

Mr. MARTINEZ. All right. Let me start it from a more simple concept then.

You have been reviewing the guidelines, have you not?

Mr. THOMAS. We have not been reviewing the guidelines. We have not.

Mr. MARTINEZ. You have not been reviewing or studying the changes in the procedures at all?

Mr. THOMAS. It often seems like I am on trial here. I have said a thousand times I have not reviewed the guidelines. The guidelines—the first step in reviewing the guidelines as we do in all other areas is to prepare background documents to do an overview so we will all start from a common knowledge basis about the guidelines. We did not have the benefit of a paper trail for the present guidelines.

Mr. MARTINEZ. But the staff has been doing something. So what I am asking is are you willing to share those——

Mr. THOMAS. We gave GAO every document that our staff has prepared. I think GAO was sent at your behest.

Mr. MARTINEZ. Right.

Mr. THOMAS. And we gave them all the documents we had.

Mr. MARTINEZ. Well, we would rather that the Commission itself shared that with at least this——

Mr. THOMAS. They are internal draft documents. We don't normally send internal draft documents all over Washington. What we normally do and what I committed myself to do to this subcommittee is provide this subcommittee with a draft proposal of changes and to be prepared to discuss those changes.

Mr. MARTINEZ. We have requested them before, but they haven't been forthcoming, so I will ask you at this time, will you be willing to give those to us?

Mr. THOMAS. You are welcome to have them. GAO has them. I don't know what good they would do.

Mr. MARTINEZ. We can record that as an affirmative then.

The question that we have is that before you do anything, considering that these were developed over a 6-year period with input from everyone that had a right to be concerned about it, do you intend to open it up for input from those people that had so much vital concern with it before and were a part of developing it before?

Mr. THOMAS. Well, the way we normally develop our regulations is that the Commission has to arrive at some conclusion as to whether it has a position. Then the process is opened up to public comment, to coordination, et cetera.

Prior to that, we don't have a Commission policy. There are proposals floating around. We don't have a Commission policy.

Mr. MARTINEZ. Well, when do you intend to finish the proposal and open it up for public comment?

Mr. THOMAS. Well, our timetable will probably include some time within the next year. It is not something that I have been pushing that aggressively.

I think the most important thing is that we start from a common knowledge basis with respect to how the guidelines have developed, the underlying rationale for them, et cetera, and that is something that we are trying to develop at this time.

Mr. MARTINEZ. When you get to that point then, do you intend to consult other Federal agencies?

Mr. THOMAS. We have no choice. We have cosignatories. What we normally do is we adopt a policy. There is usually informal coordination, but the formal coordination starts after we adopt a policy, so we have to coordinate with other agencies, we have to coordinate and consult with our cosignatories, and we have to place the—publish the guidelines or any proposals for public comment.

Mr. MARTINEZ. Will you be consulting with the American Psychological Association?

Mr. THOMAS. We will be consulting with the entire public, including the American Psychological Association.

Mr. MARTINEZ. Chairman Hawkins?

Mr. HAWKINS. My understanding is that the hearing was to discuss the uniform guidelines and the review. Mr. Thomas, you indicate that such a review is not under consideration at this time?

Mr. THOMAS. Such a review is in its very earliest stages. We are preparing the background documents which we have shared with GAO. The apparent rumor is that we are secretly developing something other than that overviewed document or background document, and that is simply not the case. If it is being prepared, I would like to know who and where it is being prepared.

Mr. HAWKINS. I don't know. Just handed a document, which I haven't had an opportunity to read this document, but just glancing at it it seems to me that in this document you are challenging the concept itself and indicating a rather comprehensive review.

Mr. THOMAS. The proposal, if you note at the bottom of the page of that, indicates that is to the President. I have to send a regulatory review agenda to the President because we are now part of the executive branch.

Mr. HAWKINS. It is the President, you are saying, who is making this statement and not yourself?

Mr. THOMAS. I have to send as the head of the agency, because we are now part of the executive branch, unlike the other independent regulatory agencies, a review proposal that we are going to put before the entire Commission over the year. The Commission has not adopted a position.

Mr. HAWKINS. Well, Mr. Thomas, let me assure you that all of your statements thus far seem to be of a very defensive nature, and

I don't think that it is necessary for you to be defensive because I don't think anyone is putting you on trial for anything.

I think that we respect your position and we are not attempting to vilify you in any way, and I want to assure you that without any equivocation that I would be the first to defend you if it becomes personal.

However, I think that certain documents indicate that there is a review going on, certain conclusions have been reached, if not by yourself, by other Commissioners, and that these seem to be in conflict with certain concepts which have been clearly enunciated, principles that have been upheld by the courts and what-not, so we are the ones who feel somewhat operating in the dark on this matter.

All we are trying to do, as I see it, is simply to bring it out into the open so we can discuss it before anything happens, but it would seem to me that certain statements have been made that are in conflict with the Griggs standard of employee selection.

Now, whether this is true or not, I go back to your assurance that before anything is done, adequate hearings will be held, that this committee and the public will be given the opportunity to comment on them so that we can protect the progress that we have made.

Now, do we have that assurance that in this review—and I, again, don't quite square that with your statements that seem to imply that no real review is under consideration. Is there a review or isn't there?

Mr. THOMAS. We intend to review the uniform guidelines. I have indicated that before. We voted in June 1984 to do so. I assured you at hearings, earlier hearings, in December of last year, that I would come before you with any proposal. I have assured you in the opening statements that we will comply with the Administrative Procedures Act and the Sunshine Act.

I have assured Chairman Martinez that we will do the same things again. There is nothing going on that we haven't told you about. There is no evidence of anything going on. They are myths. And with respect to the statements about me personally, it has been insinuated that I have had less than a capacity for the truth and accuracy and honesty, which I do not appreciate and——

Mr. HAWKINS. Who made such statements?

Mr. THOMAS. Well, I will just pass on that.

Mr. HAWKINS. Did this committee or any member of this committee make such statements?

Mr. THOMAS. There have been insinuations that I have been less than candid and honest. We and—just this particular hearing, I have said time and again to the staff, to the members of the committee, to GAO, that nothing is going on. I don't know what else I can do. I could bring in a stack of bibles or something.

Mr. HAWKINS. May I ask you—getting away from the personal aspect of it—may I ask you whether or not the Griggs selection procedure is under review and has anyone connected with the Commission or yourself made any statements that would draw a conclusion that would suggest changing the Griggs standard in any way as to the use of an impact analysis or the concept of adverse impact?

Mr. **Thomas.** The guidelines are——

Mr. **Hawkins.** If this insinuation is true, then now is your opportunity to say that it isn't true, that that insinuation is false.

Mr. **Thomas.** The guidelines are under review. Griggs and the case law that supports adverse impact is a part of the review, and I don't think that anyone has suggested, at least not to my knowledge, that we do anything contrary to Griggs, or the existing case law. I am not aware of that.

Mr. **Martinez.** Will the gentleman yield for just 1 minute for a point of clarification?

Mr. **Hawkins.** Sure.

Mr. **Martinez.** I thought in response to me that you said there was no review going on.

Mr. **Thomas.** The Commission voted on June 12 to review the uniform guidelines. We have prepared a background document, a draft of which was turned over to GAO and which I also agreed to turn over to you. That is a beginning of a review. I said that we are developing that so we can have, one, a common knowledge base as Commissioners, and so we can leave a paper trail for our decisions, contrary to the position that we find ourselves in with respect to the existing guidelines.

We have not gotten to the point where there are any proposals to make any changes in the uniform guidelines. I have indicated I have my own opinions. I have said that time and again. The review includes not only our personal opinions, which it has to, but also existing case law, existing practices, APA changes, the case law development with respect to bottom line, GAO's concerns, et cetera.

In other words, we would be looking at everything, not just our views.

Mr. **Martinez.** I yield back to the gentleman.

Mr. **Hawkins.** I understand the selection procedure with respect to the Griggs principle is under review. That, I think, makes us more determined that we alertly monitor this situation. You have assured us, however, that while it is under review, along with other things, that ample opportunity will be given for a full discussion of it obviously before it is finally concluded.

Since we have that assurance from you, I have no further questions.

I certainly think that that gives enough assurance to this committee that we will not move into changing that procedure until we have full opportunity to review it and to have this committee suggest its own findings with respect to protecting that procedure.

I have nothing else.

Mr. **Martinez.** Thank you, Mr. Hawkins.

Mr. Gunderson.

Mr. **Gunderson.** Thank you, Mr. Chairman. Thank you, again, Chairman Thomas, for attending this morning. I would like to ask a couple of questions for my own edification.

To begin with, I think I am asking these to my distinguished chairman of the subcommittee. Mr. Thomas, in his statement said that GAO was sent to investigate the EEOC at our behest. Did our subcommittee or full committee initiate any GAO investigation?

Mr. **Martinez.** On the request of the chairman, myself, Mr. Williams, and others.

Mr. GUNDERSON. On what basis and when did this happen?

Mr. MARTINEZ. What was the date of that?

This is a copy of the letter.

Mr. GUNDERSON. It was September 30, 1985. That was yesterday. We didn't vote on this. We didn't discuss it. I am not aware of it. When did it happen? Why? I would surely like an explanation.

Mr. HAWKINS. Let me explain. It was not an action of this committee. It was a bipartisan group of us who took it upon ourselves to do this. It had nothing directly connected with the subcommittee or the full committee.

Mr. GUNDERSON. What exactly did you ask for and why?

Mr. HAWKINS. We will supply you with a copy of the letter.

Mr. GUNDERSON. So we asked for a GAO investigation before any actions on the review of the UGESP were taken by the agency, the Commission?

Mr. MARTINEZ. Would the gentleman yield?

Mr. GUNDERSON. I sure would.

Mr. MARTINEZ. Any individual Congressman can ask GAO to do an investigation of any Government agency.

Mr. GUNDERSON. I understand that. I am just asking why we requested this one.

Mr. MARTINEZ. This was done by a group of individuals who had become concerned about things we were hearing and we wanted to know if there was any substance to it. That is the reason why we asked the GAO for an investigation, to find out if things alleged true or not, or what substance there is to it. It was simply done on that basis, a right that each Congressman has.

In this case, there were several Congressmen that decided we needed to do this. And it was not an action of this committee, nor did it require a vote of this committee.

Mr. GUNDERSON. I just find it most interesting, Mr. Chairman. We have had other hearings on this previously. If the hearings are not bringing out information, I assume that we decide, No. 1, whether or not we are going to subpoena some information to get what we need or we are going to hold further hearings.

Once again, I must tell you I get a little bit frustrated being the ranking minority member of this subcommittee and having these kind of actions taken whether directly or indirectly implying that this subcommittee is taking certain action or the full committee is taking certain action——

Mr. HAWKINS. May I inform the committee, we did not imply anything of the nature that the gentleman is saying. I think the chairman of the subcommittee has said to you I could have acted as one individual and any of the others in connection with asking the GAO to study something. Why do I have to come before this committee to restrict my own activity.

The gentleman, I think, is not talking about the procedure that we go through.

Mr. GUNDERSON. I would suggest, Mr. Chairman, that when the chairman of the full Education and Labor Committee and the chairman of the ranking subcommittee, which has jurisdiction over the EEOC, send a letter to the General Accounting Office asking for an investigation, of what or why I am still not sure, there is a clear implication that this action is being taken on behalf of this committee because we are not receiving certain information from the EEOC.

Mr. HAWKINS. I repeat. No such implication was made. And the gentleman knows full well that he as well as anyone else, any Member of Congress, can do it.

Now, it seems to me that the gentleman is trying to divert attention away from the witness in this hearing to attack the members of this committee, not as members of this committee, but as members of the Congress.

If he thinks for a second he is going to restrict my activity in trying to get to the bottom of the thing in terms of the legality of my right to do so, then I think he should suggest so. I will show him a ruling as to the legal process. If I must come to him to get permission to do this, I think the gentleman is far afield, and I would suggest that we get on with the hearing and not try to divert attention away from the witness.

Mr. MARTINEZ. I am going to take the prerogative of the Chair and just add one thing, and then ask you to go on to the rest of your questioning.

Mr. GUNDERSON. Sure.

Mr. MARTINEZ. It might help you to understand who signed the letter. It was Senator Edward Kennedy, Senator Alan Cranston, Senator Lowell Weicker and myself, Barney Frank, Gerry Sikorski, Pat Williams and Augustus Hawkins. You can see that there were an equal number of people that were not members of this subcommittee, nor members of the full Education and Labor Committee, that signed the letter over concerns that we outlined in the letter.

I will make sure that you are furnished with copies of the letter. But it was not an action that was taken by this subcommittee or the full Education and Labor Committee, and that should not be impugned as an action of the committee for not consulting with minority on doing it.

Mr. GUNDERSON. Well, I have never suggested that anyone, as I indicated earlier, doesn't have the authority to ask for a GAO investigation. I have asked for some myself.

I think, however, it is most unusual that a GAO investigation request was made to study something over which this subcommittee has jurisdiction, and some of us were not even informed of, such request

Chairman Thomas, you indicated in your oral statement that you—not personally, but you, the Commission, will personally draft and develop policy. Would you elaborate on what you meant by that?

Mr. THOMAS. What we attempt to do is rather than just simply engage in some sort of binding decision-making process, yea or nay, we actually get involved in the nuts and bolts of drafting the decision documents or drafting the policy statements, et cetera, then having the staff sit down and work them out.

Of course, we cannot meet as a group and draft them. But Commissioners actually take the lead role. For example, the remedies policy, the lead role was taken by Commissioner Alvarez. With respect to some of the other issues, there was no lead role. A couple of Commissioners had drafts which were circulated and comments and then ultimately a vote on it.

But, again, the Commissioners themselves do get involved in the actual drafting of the policy.

Mr. GUNDERSON. What exactly is the Commission proposing to do? Can you lay it out publicly? What are you proposing to do in your June decision of last year?

Mr. THOMAS. We are proposing to do what we have done in other areas, including looking at when we looked at our sex harassment guidelines, to just go through the guidelines to make sure that from our standpoint they are consistent with what we think the law requires, that they are consistent with the changes in the law, for example, the bottom line rule being changed within the *Thiel* case, the concerns raised by APA, and our own personal concerns that we always keep in mind.

But, again, the review is limited to what the case law requires, and we think we have an obligation to go through the entire set of guidelines as we do in other areas, whether we change them or not, to make sure that these guidelines—we do it in the age area without any kind of concern. We have done it in the EPA area, Equal Pay Act area, where we try to update things like the matters that have been brought over from labor.

It is simply a matter of going through our guidelines to make sure that they are consistent with case law, with existing practices and with what we think the law is. I mean, that is why we are there. Otherwise, we could have other people draft, but we have some views that we think should be expressed in these guidelines, and I don't know what the other Commissioners' views are, because I haven't asked them.

Mr. GUNDERSON. Are you saying this is a customary policy to make these reviews of regulations?

Mr. THOMAS. We are going to review—I think we have an obligation—I have said from day one—we have an obligation to review all of our guidelines, procedures, regulations. We have gone through and developed our manuals. We looked at our decisions, the whole bit. I mean, this is nothing. We have for the first time indexed all of our decisions out of the Office of Review and Appeals which would never cross-reference before and resulted in many inconsistent decisions, the whole bit. We have an obligation to do it, whether we change it or not. I think each agency should have a constant review process of its guidelines, rules, procedures, regulations, manuals, et cetera.

Mr. GUNDERSON. When Commissioner Alvarez testified in front of this committee, the remedies policy was a major issue. There was some contention at that time that, quote, "the remedies policy was inflexible, would prevent settlements from being reached et cetera." Do you want to comment on that at all?

Mr. THOMAS. I think I read his testimony, and I think, yes, he stated it accurately. It is not inflexible. Our effort was to make sure that the charging parties got as much out of title VII as they possibly could, and we thought that the emphasis earlier was on quick settlement, quick resolution of cases, rather than on full relief for charging parties, and we have changed that, and we have made a Commission policy to get as much as we can.

Now, that in no way ties the hands of the district directors to do what they believe is necessary if at an earlier stage they can settle a particular case. We have not done that.

And, indeed, the settlements that we are getting is an indication that that is not the case.

Mr. **Gunderson**. Mr. Chairman, I have some more questions. I don't know if you want to abide by the 5-minute time limit and come back to me or do you want me to continue?

Mr. **Martinez**. Well, let me go on to the others and I will come back.

Mr. **Gunderson**. Fine. Thank you.

Mr. **Martinez**. Mr. Hayes.

Mr. **Hayes**. Thank you, Mr. Chairman.

My comments or statements are not to be categorized as personal. I want that clearly understood, Mr. Thomas.

I hope our concerns and interests are the same, that is, to achieve some degree of equal employment opportunity for minorities, including blacks, particularly, and women, and I am not sure that the approach of revising, if I understand this as the purpose of looking at the guidelines, if the approach to revise them will actually achieve that end.

I am somewhat disturbed when you say the guidelines are too complicated, as I understood your remarks, and unsound, and you will not support any policy which is premised on our race, yours and my race—I think I understood you to say that.

You also indicated that you felt that any preconceived notion of blacks being inferior was the wrong kind of an outlook. You felt that there was some preconceived notion within the guidelines, I guess, of blacks being inferior.

I am not a "naysayer" or a detractor. I want that clearly understood, but I have shown you what my concern is. And I am not one—my criticism is not rhetorical criticism. It is based on what I am—my real concerns as a member of this committee.

My specific question is, I understand that Ms. Newman is the only outside consultant currently working on the guidelines. Is she—I want to know a little bit about her. Is she a psychologist? Has she ever litigated in the title VII area? Has she ever handled a case involving the guidelines and validation procedures?

If so, where and when?

Mr. **Thomas**. First of all, let's go back. Just as you have concerns as a Congressman, I have concerns as a Commissioner. And I think I respect your concerns, and all we have ever asked is that ours be respected.

Ms. Newman is simply taking the staff draft of the background document and redrafting it for us. She is not reviewing the guidelines, she is not providing expert analysis of the APA's requirements, she is not providing the background on the litigation of these cases or anything else, she is simply going through a draft that was prepared by the Office of Legal Counsel and redrafting it. That is the extent of her role thus far.

Mr. **Hayes**. Has she ever handled a case involving the guidelines?

Mr. **Thomas**. I don't know. She is a lawyer and has been a lawyer for quite some time.

Mr. HAYES. Can you give me a little brief understanding as to what the basis of her selection was as a person?

Mr. THOMAS. She is an excellent lawyer, and she is an excellent writer, and she is taking the material that has already been put together and preparing a finishing touch on the background document, and it is as simple as that. Just like the selection of the rest of my staff.

Mr. HAYES. She does have background in this area, then?

Mr. THOMAS. She has worked for the Commission. She has been at the Commission now for about a year. But I don't know what her background is in this area. She is simply redrafting the staff draft of the document.

Mr. HAYES. I understand that she intends to finish this working paper at the end of this month; right?

Mr. THOMAS. I don't know what the time frame is. I have not put a time frame on her.

Mr. HAYES. Will you be sharing her conclusion, her papers with——

Mr. THOMAS. I don't think she will reach a conclusion, but since the GAO already has everything else, you are welcome to that, too. I don't think that it is going to be substantially different.

Mr. HAYES. No further questions at this time, Mr. Chairman.

Mr. MARTINEZ. Mr. Williams.

Mr. WILLIAMS. Thank you, Mr. Chairman.

Mr. Thomas, in your questioning of the value of the disparate impact standard and in wanting to rework the uniform guidelines, I have a concern that I would like to visit with you about. Without those guidelines and that impact statement, how would you comply with the intent of the Civil Rights Act, section 703(a)(1) and 703(a)(2) which reads:

> It shall be unlawful employment practice for an employer to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee because of such individual's race, color, religion, sex or national origin.

Mr. THOMAS. I don't remember suggesting not having the guidelines.

Mr. WILLIAMS. Well, let me ask it another way. Are you supporting modifications to the uniform guidelines?

Mr. THOMAS. I will probably. I have not completed a review, but my view would probably be that there would be some changes. I think that I should wait until I get a full review before I make that. I think I have attempted to be sufficiently prudent in that portion of my statement about the uniform guidelines. At no point did I suggest that we should entirely eliminate the guidelines.

Mr. WILLIAMS. Nor have I suggested you have suggested that, but you may ask for modifications and what I am getting at is that this committee, and of course, the Congress, because it passed the laws, wants to express our concern—at least I want to express my concern—that any modifications in the uniform guidelines will fully comport with those sections of the law relating both to intentional violations and adverse impact.

Mr. THOMAS. I think that it is safe to say that we have no intention of drafting any guidelines that do not comport with the law.

That is why we are reviewing it rather than just changing them unilaterally.

Mr. **Williams**. When some of us from both the minority and majority, and both the Senate and the House, sent this nefarious letter of July 15 to the Comptroller General, we wanted, of course, to examine a number of things and among those was the way in which the decision was made to attempt an expansion of the previous study.

Let me ask, what, if any, role OMB played in your decision to make a motion asking for an expansion of that review.

Mr. **Thomas**. What expansion?

Mr. **Williams**. According to GAO's response to us—let me see if I can find it, if the chairman will excuse me.

Mr. **Martinez**. Surely.

Mr. **Williams**. Their response to us of September 30, they say on July 31, 1984, EEOC approved Chairman Clarence Thomas' motion to expand an ongoing EEOC review of the recordkeeping requirements to a review of the entire guidelines.

They go on. Part of the expanded review was to focus on the concept of adverse impact. And I am just trying to get at the way in which that decision on your part was made.

Mr. **Thomas**. It was made in an open meeting.

Mr. **Williams**. And had you consulted with OMB?

Mr. **Thomas**. I never consult with OMB, OPM, Justice, DAO, Department of Labor, or any of the rest. There was a decision made by the EEOC. And that is the way that we have operated for 3 years.

Mr. **Williams**. The decision was clearly yours and theirs, and I understand that, but you are telling me that prior to that you had not been in consultation with OMB or they had not encouraged you to make that motion.

Mr. **Thomas**. OMB, OPM, Justice, other agencies, when I first became Chairman urged, cajoled, insisted that we review them. I said no. I will do it when I get good and ready to do it.

We were ready to look at them. And that is that. I don't see—I do not consult with OMB to make changes at anything at EEOC. I don't consult with OPM. I don't consult with Justice. We have to consult because we are part of the executive branch, we have to go through the coordination process. We make our decision on our own. I have said that in other hearings, and I stand by that.

Mr. **Williams**. Let me be sure that I understand that. At an earlier point, OMB and others suggested to you that a review of the guidelines be comprehensive, and then you asked for that review later, as you say, in your own good time.

Mr. **Thomas**. In 1982, when I became Chairman, one of the first issues that was being pushed was a review of those guidelines. I said no. I had not been at the Commission. In fact, GAO did a report that same summer saying—I believe in July of 1982—urging us to review the guidelines. Again, we said no.

I indicated to GAO that I had not been there long enough to reach a decision. I indicated to Justice, to Labor, to OPM that I hadn't been there long enough.

We made the decision unilaterally without consultation, with OMB, Justice, OPM.

Mr. Williams. Thank you, Mr. Chairman.

Mr. Martinez. Thank you, Mr. Williams.

Just one followup question. Who at OMB and the Justice ask for the revisions?

Mr. Thomas. I don't remember. It was probably the counsel or someone. There were discussions back and forth the whole summer, and there were just people who are interested in OPM. I believe it was a counsel to the Director. There are also people—everyone had a vested interest in, perhaps, changing them.

Now, I thought that as a cosignatory, and with the lead role, that EEOC should be much, much more prudent and should not engage in hasty revisions of those guidelines.

Mr. Martinez. In an overview that you signed off on, there were statements that are attributable to you. Would you enlighten us whether you agree with one statement that the premise underlying UGESP are conceptually unsound because blacks, Hispanics, other minorities and women are not inherently inferior.

In other words, your statement is indicating that since you feel that they are unsound, they have to be changed.

Mr. Thomas. My personal view is that there are premises underlying a lot of the preferential treatment provisions of whatever we do in this society that assume the inferiority of certain groups. I don't buy into that. I haven't and I won't.

I mean, that is the end of that. And if I find it in guidelines or anyplace else, then within the law, the available room that I have to operate, I will try to do away with it.

Mr. Martinez. How do you get to the argument that they are unsound because they imply inferiority?

Mr. Thomas. It is fairly simple for me. I mean, if you have got to give somebody a handicap, then you assume that they are not functioning for some reason. If it is a matter of preparation, then prepare them. If it is a matter of some immutable characteristic, then that immutable characteristic must mean some inferiority. It is as simple as that.

Mr. Martinez. There are many of us that are supportive of UGESP but, not because we feel that somebody has a handicap.

Mr. Thomas. Well, I mean, what are we doing?

Mr. Martinez. Handicap in the ability or——

Mr. Thomas. There has got to be some performance related problem or you wouldn't be doing it.

Mr. Martinez. There is, it is very clear that certain people are denied employment simply on who they are not what they are, and that is the concept behind the establishment of guidelines by which you would rectify a wrong that had been committed and that is what we are talking about, not inferiority.

Mr. Gunderson.

Mr. Gunderson. Thank you, Mr. Chairman. Let me just indicate to you, and I have shared this privately with Mr. Thomas before, that I don't agree with some of his personal opinions on goals, timetables, et cetera. I think there is systemic discrimination in this country, but he has voiced his personal opinion—and now you have heard mine, I guess.

First of all, define "paper trail." You have used that word a number of times this morning.

Mr. THOMAS. Well, when we showed up at EEOC, when we began to look at the major policy areas, we had no documents. When I was at the Department of Education as Assistant Secretary, at least when you wanted to look at a policy, you went back and for the duration of the development of the policy, you found the documents that led to the development of policy, the drafts, the background documents, the options papers, et cetera. You could simply go to EXEC SEC and pull all that out.

I think that in any agency where you develop policy, you need that kind of paper trail, you need to be able to go and find the underlying documents, just as you send GAO in, they should be able ten years from now to find out why this Commission made a particular decision. We shouldn't have to traipse all over Washington looking for the background documents. We simply don't have them. We didn't have them in other policy areas.

So to remedy that, I upgraded our Exec Sec function to one where you could not only record the meetings, but where you could pull together the decisionmaking documents, the various drafts, the various mark ups, et cetera, so whoever comes after us and whatever mistake they think we made, at least they know why we made it, or why we did something.

We don't have the benefit of that now. I think that it is important to have that.

Mr. GUNDERSON. I don't intend to infer any personal negative opinion against any one association, but I would like you to educate me as to why there is some criticism of the Commission for not working with the American Psychological Association in its review of the Uniform Guidelines.

I mean, why the American Psychological Association specifically? Why not the American Psychiatric Association? Why not ASME? Why not NAACP? What about the chamber of commerce? I don't understand what the relationship is between EEOC and the American Psychological Association.

And if you could tell me, I would appreciate it.

Mr. THOMAS. Well, I would hazard a guess, because I didn't come up with that association. Again, we don't have the background documents to make that determination, but it appears they are the experts in the testing field, and at least that is an organization that represents, or a trade organization of experts in this field.

I think they have guidelines or standards, so it would be logical to have some association with them if you are doing something in the testing area. I think we can always question why one group is chosen as opposed to another, and we have not, again, gotten to that point.

But at some point. I think we are sufficiently prudent to know that we are going to have to consult with or work with some experts in order to develop standards, whether it will be the APA or someone else, has not been something that we have determined.

But, of course, they always have an option to participate in the process.

Mr. MARTINEZ. Would the gentleman yield?

Mr. GUNDERSON. Sure.

Mr. MARTINEZ. There are probably, in my mind, at least two reasons. One, they were so heavily involved in the original obligation and final decisions on the regulations. Two, they are the one organization that is heavily involved in labor and understood and had the expertise in that field.

Mr. GUNDERSON. I am not against the association's involvement. It just seems rather unusual that one association has this presumed automatic involvement in the process.

You know, when you sat down to testify I wanted to interrupt you and say "relax." I think everybody around here is too intense this morning. But while you have been talking, I have been reviewing some of the other testimony and I guess I understand why you are a little bit chagrined.

I would like to read for you some statements that are going to be said later on this morning in the hearing, and I would like to have your response to them, if I could.

This is the Lawyers Committee for Civil Rights Under Law. And just be patient with me now.

On page 4, they say:

> The efforts by the current leadership of the EEOC to change these standards are based solely on the extreme personal view of its highest officials without regard to any practical considerations and without regard to the commands of the law.

They go on, page 6:

> In the August 8th, 1985 regulatory program of the United States Government, Chairman Thomas of the EEOC complained the EEOC and the Departments of Justice and Labor turned the statutes in their head by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables and by using statistical rules to define discrimination without regard to the plain meaning of the term.

He stated:

> He intended to reverse the fundamentally flawed approach to enforcement of the anti-discrimination statutes without even bothering to mention the Supreme Court's unanimous decision in Griggs; he criticized the Uniform Guidelines procedures because they incorporated a statistical definition of adverse impact.

On page 8:

> In the single, most irresponsible instance, anonymous senior officials of the EEOC criticized the use of statistics by the EEOC itself in its case against Sears Roebuck while the case was awaiting decision by the court.

Finally—and there are just hundreds of examples in here—let me go to page 12, and on behalf of the whole Commission, you might want to respond:

> The EEOC's outline of issues for the Uniform Guidelines employee selection process review further demonstrates that the current review bears no relationship to any fine-tuning or updating of the existing Guidelines, but is instead, nothing more than an effort to repeal existing law.

That is a pretty serious charge.

Mr. THOMAS. Yes.

Mr. GUNDERSON. Do you want to comment on these?

Mr. THOMAS. Well, they have the credibility. I mean, that is nonsense, but I am not going to waste my time or yours trying to deal with nonsense. I have some strong views, and I have never been termed an "extremist", but I guess it depends on where you stand with people when you disagree with them.

I have some strong feelings about uniform guidelines and a lot of other things. We have never—no one can give you any evidence where we have not enforced the law, where we have not based our decisions on existing law. They can't look at any rulemaking that has been done in secret. They can't give you an example of any regs we have changed that haven't been in compliance with existing law, the whole bit.

I have my opinions. I will stick to my opinions, but when we do the regs, when we do the review, my opinions have to be tempered by what the law is. I have said that time and time again.

And the Lawyers Committee and others can, I think, just sort of float around and make irresponsible statements without any backup. That is fine.

I can't—I don't have the ability to change that. And I simply won't try.

Mr. **Gunderson**. I have two final questions, Mr. Chairman, and then I will be done.

No. 1, can you assure us in this committee that you are not intending through the review process to repeal existing law?

Mr. **Thomas**. I don't think that we have the capacity to repeal existing law, no matter what we think of it, nor have we ever attempted to repeal existing law. I don't see how you repeal a Supreme Court decision.

Mr. **Gunderson**. Can you assure this committee that with regard to those allegations of secrecy on the EEOC's review that, yes, there will be an opportunity for public comment before any new regulations go into effect?

Mr. **Thomas**. We can assure the committee that that will be the case and that we will comply with the Sunshine Act and the Administrative Procedures Act, which we always have done.

Mr. **Gunderson**. Thank you.

Mr. **Thomas**. Thank you.

Mr. **Gunderson**. Thank you, Mr. Chairman.

Mr. **Martinez**. Thank you, Mr. Gunderson.

Mr. Hawkins.

Mr. **Hawkins**. I did not intend to get into this, but in view of your response to Mr. Gunderson's questions, I have reread this document that you have submitted to the Office of Management and Budget. They are your views. May I ask you whether or not you still maintain these views? You have said, for example, that the uniform guidelines makes determination of discrimination on the basis of a mechanical, statistical rule that has no relationship to the plain meaning of the term discrimination.

And you go on to say that such disparities in the rates at which employers hire or promote people of different races, sexes or national origins may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination.

You are suggesting there, obviously, a shift in the presumption from the current law as upheld in the *Griggs* case. Then you go on to say again:

> I will propose to the Commission and to the co-signatory agencies a revision of the Uniform Guidelines that will recognize that statistical disparities are not tantamount to discrimination, that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards.

I don't have to ask you whether those are your statements because—

Mr. THOMAS. Those are my statements and I stand by them. OK. I mean you have a——

Mr. HAWKINS. I was going to say you have made the same statements before this committee in previous testimony.

Mr. THOMAS. Yes.

Mr. HAWKINS. So these statements would seem to indicate what the Lawyers—statements made by Mr. Gunderson are actually supported in fact, that these are your views, that you are against race-conscious remedies, and that you are, in these statements, discounting the use of statistical data as a presumption as upheld in Griggs.

I can't see how you can read it otherwise, and for you to say that obviously you are going to uphold the law, you can't do otherwise, thank heavens, but certainly you can nullify and confuse the operation in the enforcement agency of what the law itself says, and that seems to be precisely what this is all about.

Mr. THOMAS. Mr. Chairman, is there any evidence that I have ever put in place regulations that have confused the law?

Mr. HAWKINS. I am not suggesting that you have put in place any regulations contrary to the law. What I am suggesting is that this would indicate that you are going to make in the future recommendations that are definitely contrary to the law, and if that is what you intend to do, then I again repeat that you cannot change the law, and that you are going to have to come back to somebody else, but I do say that this is an indication of the ineffectual way in which you intend to operate the agency and that, I think, is unfortunate because while it is not a violation of the law, it certainly is reducing the law to nonsense, as you indicated yourself.

Mr. MARTINEZ. Do you care to respond, Mr. Thomas?

Mr. THOMAS. There is a statistical disparity of women on this committee. Is that discrimination? There are no women on this committee.

Mr. HAWKINS. It could create a rebuttable presumption. And what you are saying here is you are indicating all of the rebuttal data that would be used in knocking down that presumption.

Mr. THOMAS. We approved the five systemic cases all having statistical——

Mr. HAWKINS. You are indicating that if we are charged with discrimination, that we cannot to defend ourselves, the presumption is that if under adverse impact there seems to be some trouble, then it means that the individual that might be alleged to be discriminating has to show that it is job related. He has to defend himself.

What you are saying is that your agency—your agency—has to defend itself, just as you are trying to defend yourself before this committee, which I think is—well, I won't call it for what it really is, because it might seem to be rather emotional, but that, I think, is our difference, and that is our difference——

Mr. THOMAS. Is the 80-percent rule from Griggs?

Mr. MARTINEZ. Mr. Hayes.

Mr. HAYES. Just continuing in the vein—I will be very brief, Mr. Chairman. I just want to get clear as to whether or not the chairman agrees that there has been a denial of opportunity for equal employment of minorities, women, handicapped and the aged in our society. Do we agree that there has been a denial of opportunity?

Mr. **Thomas**. Mr. Hayes, there is—I grew up in Savannah, GA, and it is obvious that there has been denial. It is obvious that it continues to exist.

I mean, there is—I don't think anyone can deny that. We get almost 70,000 complaints a year dealing with denials of opportunities. So I don't think that there is any debate or any discussion about whether or not there is a denial of opportunity. I think it is there, and I think it is taking on forms that we otherwise—that we did not even conceive of in the past.

Mr. **Hayes**. You refer to the Griggs' standard as adopted by the Supreme Court and approved by this Congress, and in your outline for the review of the uniform guidelines, which is sort of a continuation of the question of my colleague, Congressman Hawkins, there is an implication that impact analysis may no longer be necessary.

Is there an attempt on your part to rewrite title VII by eliminating the Grigg's standard underlying the uniform guidelines?

Mr. **Thomas**. We continue to use the impact analysis. We use it in our systemic cases. We use it in development of other cases that come before the Commission. There has been no suggestion by anyone to eliminate the impact standard as required by Griggs and approved by Griggs.

That has not occurred. I mean, that is Supreme Court law.

Mr. **Hayes**. Do you have any timetable as to when you intend to finish the UGESP study and review and be ready for public comment?

Mr. **Thomas**. I have no definite timetable. I had hoped to finish up early sometime next year with some kind of a proposal, but we have devoted our attention to other things beyond our control.

Mr. **Hayes**. In this process of review, will you be conferring with other Federal agencies who conferred with the adoption of the guidelines some 6 years ago?

Mr. **Thomas**. Yes. We have to consult with all the cosignatories. Of course, we have the role of the Civil Service Commission now. Treasury has somewhat of an interest, but the major individuals will probably be Justice, OPM, and Labor.

Mr. **Hayes**. Am I being presumptuous when I assume that you will be coming before this subcommittee before the agency votes on any proposed guideline changes?

Mr. **Thomas**. I don't know what we could come before this committee since we wouldn't have a proposal that has been adopted by the committee. I have indicated that we would definitely be before the committee with any proposal before they became final.

Mr. **Hayes**. Thank you, Mr. Chairman.

Mr. **Thomas**. Before it became final.

Mr. **Martinez**. Thank you, Mr. Hayes.

Mr. Williams.

Mr. **Williams**. Thank you.

Mr. Thomas, it occurs to me that we are not getting very far. You perceive at least some of the members of the committee to be hyperaggressive toward you, and some of us think you are hyperdefensive. Maybe there isn't much need for either, but let me clarify my own position for you.

We agree that there is discrimination in the land, and I think we would agree that there is racism in the land. That isn't at issue here.

And really at issue here as far as I am concerned is not whether or not you have the ability to change the law—of course, you don't. There is another issue which might serve some to explain to you our attitude.

Look, our friends on the right were correct this past decade-and-a-half or so when they expressed significant concern about the power of the bureaucracy. It has, in fact, become a fourth branch of Government.

The Republicans, conservatives, were right about it. They have become ironically silent for the past 5 years about their concern with the bureaucracy, but nonetheless they were right. The Democrats, the liberals, moderates, didn't pay enough attention to that, because we have learned now that the bureaucracy, although it cannot change the law, has enormous power through retrenchment, molding, shading, shifting, revising, stonewalling, expanding, contracting, and that is why we are concerned.

You have enormous power, and we want your assurances that that enormous power is not going to be used to modify, shade, expand, contract or in any way change the accepted law of the land that was put in place by the people's elected representatives.

That is what this hearing is about. And your attitude is, gee, you guys are nitpicking on something that I can't do. You can do it. That is our concern.

The Democrats in Congress gave too much power to the bureaucracy. You can do it. And that is our concern. That is why we have you up here today.

Mr. THOMAS. I believe, Mr. Williams, I have as much of a vested interest or more than any member of this committee in the enforcement of these laws.

Mr. WILLIAMS. Good.

Mr. MARTINEZ. You have heard the concerns as adequately interpreted as they could possibly be by Mr. Williams. He echos the concerns of this Chair. We hope that as you proceed that you heed some of these concerns as well as the interpretations of discrimination by the Congress and the Supreme Court. In the determination if there are any reasons why regulations should be changed, that the reasons seek improvement, not weaker policy.

We thank you again for appearing before us.

Mr. THOMAS. Thank you.

Mr. MARTINEZ. With that, we would like to call our second witness, Prof. Alan Blumrosen, former Director of Conciliation, EEOC, Rutgers University Law School.

Mr. Blumrosen, why don't we just give a few minutes for the crowd to leave in a quiet and orderly fashion so that we might proceed with the hearing.

Professor Blumrosen, would you proceed?

STATEMENT OF ALFRED W. BLUMROSEN, PROFESSOR OF LAW AND HERBERT J. HANNOCH SCHOLAR, RUTGERS LAW SCHOOL

Mr. BLUMROSEN. Mr. Chairman, committee members, I appreciate the opportunity to be here today. I am professor of law at Rutgers Law School and I have been there for 30 years, served as acting dean of the school.

In the early sixties I analyzed the New Jersey Civil Rights Division, and basically on the basis of that analysis I was asked to come down and help set up the Equal Employment Opportunity Commission in 1965.

I served as the first Chief of Conciliation for the Commission and helped to develop conciliation procedure, remedies. I recommended the adoption of the original testing guidelines that you are concerned with here today, and negotiated a number of conciliation agreements, including the one with Newport News Shipyard that established the proposition that correction of discriminatory practices required revisions of entire industrial relation systems and not only the relief to some individual people.

When I returned to Rutgers, I continued my work with the Government. I served with the Civil Rights Division of the Justice Department, and in 1969 became a consultant to the Labor Department, helping to develop the Philadelphia plan and order No. 4.

In the early seventies, I published an article entitled "Strangers in Paradise, Griggs against Duke Power Company and the Concept of Employment Discrimination," which the Supreme Court has been kind enough to cite on two occasions.

I administered grants of approximately half a million dollars from EEOC and HUD, and supervised a 2-day symposium on the 10th anniversary of title VII in 1975.

I came back in 1977 as a consultant to EEOC Chair Norton, who was the EEOC's representative to the committee which recommended reorganization of the EEO programs and to the interagency group which drafted the uniform guidelines on employee selection procedures which is a concern to you today.

I also recommended the development of the affirmative action guidelines and participated in the development of the rapid charge processing system.

I have continued my interest since 1980 in that field. I have represented employers, unions, and employees in dealing with EEO matters, and most recently I have represented the NAACP in an effort to see that Executive Order 12067 was enforced.

I have discussed my background to make clear that my approach to EEO matters is nonpartisan and practical. I have served in the administrations of Presidents Johnson, Nixon, Ford, and Carter.

Each administration took a slightly different approach to specific problems, but there was a continuity of overall purpose during that entire period. Each administration in its own way treated title VII as a charter of liberty for suppressed groups, and sought to enhance opportunities for members of those groups.

Given that commitment, it made some but little difference whether the party in power was Republican or Democratic. My basic concern is that this concept has been abandoned and title VII is now viewed by the present administration as a technical statute with narrow and limited objectives.

I have also always been concerned with practicalities. You need to have in the EEO field as in any other field a kind of a program which can work. It makes little sense to make great pronouncements and then not be able to implement the pronouncements because the programs are unworkable, impractical, or have negative effects.

I have studied the OMB proposal document that you are concerned about and other matters that you requested my attention to and I would like to approach them from the perspectives I have indicated, but with one additional perspective.

The committee and the Congress should be very proud of what has happened in this country since 1965. Extraordinary progress has been made and we have finally learned by 1980 how to go about the business of doing equal employment.

No administration has a monopoly on wisdom. I came in 1965 and made some recommendations. I came back in 1967 and suggested that we change the things that had been done in 1965 because times have changed. So the fact that there is a review is of legitimate matter for Government concern.

Now let me turn first to the uniform guidelines themselves. I am relying in what I say solely on the published statements from the EEOC that was issued on August 9 of this year where the EEOC proposed to review the uniform guidelines and the essence is this of the uniform guidelines:

We no longer have explicit restriction of minorities or women to limited numbers of jobs. But if a selection procedure has the effect of an explicit restriction and if it can be allowed, then title VII has become a mere form of words so the credibility, as Judge Sobalov said in *Griggs*, the credibility of the whole legal system is at stake in connection with this issue.

The principle of the selection guidelines and of *Griggs* is a simple one. If there is adverse impact, then the employer must justify the practice that produced it by demonstrating business necessity.

If the business necessity can be demonstrated, that is it. The imperatives of production prevail. But, if not, why should anybody exclude minorities and women from those opportunities?

The principle has worked well. Not only for minorities and women, but for white males. Take, for example, the case of the short cops. As you know, there were height requirements to become police officers in most jurisdictions.

Those height requirements had an adverse effect on women and on Hispanics. They have now been abandoned. As a result, you not only have minorities and women in positions of police power, but you have short, white men who never would have had an opportunity to get those jobs had it not been for the civil rights movement.

Every short, white cop owes his job to the civil rights movement.

It goes beyond that, because to the extent that title VII required the test be rationally related to the jobs to be performed and whites and minorities then were able to get those jobs, the whites who have those jobs may not be the same people who would have gotten the jobs under a non-job-related test standard.

So, in a sense, virtually everybody in the country has benefitted from the greater degree of rationality and job relatedness which title VII has required. Well, if it has worked so well, why are they being reviewed now?

There are two statements in the OMB document which say why they are being reviewed now. One is the assumption—and this has been stated before here today—that but for unlawful discrimination there would not be variations in the rate of hire or promotion for people of different races, sexes, and national origins.

The guidelines don't say that. They don't adopt that as a presumption. All they say is if there is a differential rate of hire, that is a starting point for an inquiry. So the statement in the OMB document is wrong. It is simply incorrect.

Now, as the committee members have indicated previously, if the EEOC were to repeal the guidelines tomorrow, the basic principle would remain in effect, because the Supreme Court adopted it in the *Griggs'* case.

By the way, if I may say, I think that *Griggs* case is the most important case since Brown against Board of Education in the field of civil rights. And I don't know that Chief Burger who wrote the opinion has received adequate recognition for that major contribution that he has made to improving life for Americans.

But if you didn't have the guidelines, which deal extensively with rather technical questions—how do you identify adverse impact, how do you validate—you would be thrown into an area of uncertainty on those questions that would be disadvantageous to the business community and disadvantageous to the society in general.

The guidelines are intended to help people figure out how to comply with the statutory requirements, so they are of necessity.

Second, the EEOC said that the guidelines seem to assume some inherent inferiority, as the chairman had read before, of blacks, Hispanics and others, suggesting that they should not be held to the same standards as others even if the standards were race and sex neutral.

The suggestion that the guidelines have that as a premise is incorrect. The premise, as the chairman suggested, is that a condition of inequality has been imposed on minorities and women through a history of slavery, subordination, and discrimination.

And it is that condition that the Civil Rights Act was intended to address. The EEOC statement just ignores social history completely.

The act was intended to improve conditions of minorities and women, not to permit continued subordination in some other way. Thus, the proposed revision of the guidelines proceeds from two erroneous premises, and it is sort of unlikely that from those premises a constructive solution could be reached.

But the process of developing guidelines might change those erroneous premises and lead to some improvement. I think the EEOC is required to follow the same process in revising the guidelines that was last followed when they were developed by Supreme Court opinion.

Let me take a moment to explain that process. You go back in the history of the EEOC between 1965 and 1977, a lot of guidelines were issued just out of the Office of the Commission without any notice or comment or public participation. The Supreme Court, Chief Justice Burger, and I think it was Justice Blackman, criticized that process in 1975, and the EEOC changed it.

Since 1977, all of the EEOC guidelines have gone through the following kind of process, some kind of informal consultation first, then the approval of a proposed document, proposed regulation for public comment in the Federal Register, and then a review of the comments as they came in.

The selection guidelines, the uniform guidelines, went through a much more extensive process than that. Before the EEOC even began—even considered issuing for a publication for comment, there was an informal document circulated among the interested parties. There was extensive discussion. This is before the EEOC took a position.

And I think this is the point that is very important for the committee to understand, that the discussion has to take place before there is a preliminary publication for comment by the agency because that is the time when you can begin to iron out a lot of general differences.

The process that we went through in 1977 and 1978 is described in some detail in the uniform guidelines themselves as they were issued in the Federal Register, and I won't pursue that any further, other than to suggest that that process is very time consuming.

And by the way, the guidelines do refer to the American Psychological Association as one of the organizations that was consulted back in 1978.

There was a public hearing on the proposed guideline. There were many, many meetings and a lot of interagency consultation.

Now, it is now October 1985. The OMB submission said that they hoped to have a vote by the EEOC by February 1986. It is inconceivable to me that if serious consultations take place, it could possibly take place within that period of time.

I think that you probably have gotten some assurances that there will be some further consultation than that, and I certainly hope that that happens.

Second, let me turn briefly to the point about statistics and discrimination that was raised earlier. Statistics are important both ways. Statistics can help show discrimination.

If you have a factory with 50 percent female workers and no female managers, it gives rise to a question of why. And if a female is denied a managerial position, it strengthens the prospect or the possibility that she was discriminated against.

Conversely, if you have a factory with 50 percent minority workers in it, and you have a good number of minority managers, when a minority claims he was discriminated against because he didn't get a managerial job, the employer's denial of discrimination is more credible because the employer has minorities in those jobs.

So that both complainants and respondents need to be able to use statistics.

With respect to the use of statistics for dealing with patterns of discrimination, that is another area where it is useful, and I have long urged with not too much success in any administration, that the way those statistics should be used is as follows:

We now know—EEOC publishes books of statistics. You can turn to the statistics for Tulsa, OK, or any other place you want and you can find what the norm is—what are employers able to do out there by way of hiring minorities and women in different job categories.

It is certainly fair to ask of those employers who don't live up to the norm set by other employers why not, what are we doing that prevents you from doing as well as your other employers in the same general area and same labor market, particularly given the prevailingly higher employment rates among minorities.

So statistics are necessary, and they are necessary for everybody in the field. It is a two-edged sword. And for the EEOC to minimize or limit the use of statistics would hurt not only complainants, but it would hurt employers as well.

Third, with respect to the OMB submission, they have a proposal to remove the goals and timetable programs from recruitment and hiring of minorities and women who are underrepresented in the Federal service.

I suggest to you that if they do that, they may be in violation of the Garcia amendment which requires that the EEOC identify underrepresentation of minorities in the Federal service and develop programs to eliminate the underrepresentation.

A goals and timetables program is a natural and historically accepted way of doing that, so I would urge the committee to inquire as to what is proposed there to determine whether it might violate an existing act of Congress, to whit, the Garcia amendment—that is an amendment to the Civil Service Reform Act of 1978.

Next, relating to goals and timetables. I think the EEOC has abdicated a position of responsibility which was given it by this Congress and the President in the Reorganization Act of 1978. Let me take just a moment on that, if I may. I think this is a very important matter.

In 1978 in order to deal with conflict and confusion among different agencies, the President proposed, and this Congress ratified, the Congress in 1984 really ratified it, a reorganization plan which moved to the EEOC the responsibility to coordinate Federal agency programs in this area.

It was backed by an Executive order, which is still in effect, which gave the EEOC the leadership role in connection with that matter.

On the issue—and the EEOC exercised that power by issuing affirmative action guidelines in 1979, which support the use of goals and timetables under appropriate circumstances. Those guidelines are still in effect today, so the official position of the EEOC is in support of the goals and timetables by employers. It hasn't been changed. Obviously, the Department of Justice has not been following that view. They have been engaged extensively in an effort to eliminate the use of goals and timetables and the EEOC has sat back and done nothing about that. The EEOC has not insisted that that reorganization plan and the supporting Executive order be followed.

The result is there is the very kind of confusion in the land today about goals and timetables that Congress and the President intended to clear up by what you did in 1978. The EEOC is at this point to be the lead agency and the EEOC's policy is in support of goals and timetables. Yet the Assistant Attorney General and others who have taken a different view and the Labor Department's view is difficult to fathom.

I think, as I said earlier, there has been an abdication of responsibility on the part of the EEOC that this committee ought to be interested in. There are reasons why Congress placed the responsibility in the EEOC back in 1978.

One, of course, was the confidence that everybody had in then-EEOC Chair Eleanor Norton. But, in addition, the EEOC had begun to make policy in the sunshine with all the discussion of programs before they adopted them, so that all concerned about participate.

Second, the EEOC is bipartisan so you get a broader view of things. And third, the EEOC has a specific mission to improve the opportunities for minorities and women, but the EEOC simply has not exercised the power that it has, and I would hope that this committee would inquire as to how that came about.

Fifth, and I appreciate that I am trending on your time, let me take just a moment, though, on the new case processing procedures that you have referred to earlier today where the Commission has said that it is going to investigate fully all cases of discrimination and scrap the rapid charge processing system, or, at least, reduce its significance.

There is nothing new in that. The EEOC did that originally back in 1965. In fact, I recommended it.

But it was the full investigation that gave rise to the backlog of cases. And when it takes 3 years to get a case processed, not only is justice delayed, justice is denied.

Let me explore that just 1 second. Take a case of somebody who is discharged from a $300-a-week job and claims that it was because of discrimination. If you can get to the settlement of that case in 3 months, you have got $3,600 in back pay to negotiate about; manageable, if the case can be settled.

But if you don't get to that case for 2 years, you have got $31,000 in back pay that the employee wants, and the employer can probably go through a district court proceeding defending the case for that amount of money.

So that the bare fact of the increased delay that I think is likely to result is disadvantageous. There are many other problems with the system.

My concluding recommendation in here is that the agency should have done with respect to that what Commissioner Norton did when she put in the rapid charge processing system; that is, try it out in a few offices first, experiment with it, and let's find out whether the EEOC's good expectations for it are justified or whether the concerns that I and others have that it will work to the disadvantage of everybody are justified. As far as I know, the EEOC never considered introducing that program on an experimental basis.

Finally, there is some inconsistency, I think, between the new case processing system, which makes settlement difficult. If the EEOC says they might remove a manager or insist on the removal of a manager who discriminates, they now give an incentive for every manager to resist settling cases.

The case processing procedure makes settlement difficult, but the proposed revisions in the Age Discrimination Act to allow unsupervised settlements of age discrimination cases are intended to make it easier. Well, I think they ought to be consistent. I think they ought to be for settlement or against it. But they seem to be operating in a somewhat inconsistent way.

Finally, if I may trespass for one moment on your time. I think it is important that we not be totally offensive or only be defensive about the civil rights programs of the last 20 years because those programs have been so successful that many minorities and women have now moved up in the world and now need other kinds of protections than were needed back in 1965.

Take the year 1980 alone. Minorities earned $9 billion more in the year 1980 than they would have earned under the occupational distribution of 1965. A quarter of the minority labor force, nearly, 23 percent, were in higher job categories than they would have been under the distribution of 1965.

The figures for women are even more dramatic. Over 4 million women were in higher job categories in 1980 than they would have been under the occupational distribution of 1965. They earned $22 billion more than would have been earned under the prior—so the change needs to be recognized.

I have suggested—and I have attached an article to my testimony that goes into detail on this—that the civil rights agenda should be broadened to not only defend the programs that we have had in the past but to take account of these new developments.

For example, you rarely hear about a civil rights tax program, yet there are two things that are of great importance. What is the bottom rate of taxation, because there are still more poor people in the minority community proportionately than otherwise. The civil rights movement hasn't addressed that.

The fact that under the present tax structure the rich in the higher brackets can borrow money more cheaply than the poor should be addressed. It hasn't been addressed.

There was no need to address it when all minorities and most women were poor. But there is a need to address it as we move into the new age.

I have suggested several other policies that I will not pursue here now just to give you an idea that I think—I would hope the committee would use its good offices to encourage the civil rights movement to look anew and develop additional agenda to take account of the great success that this committee and many others in the country have contributed to developing in this field.

Thank you very much.

[The prepared statement of Alfred W. Blumrosen follows:]

PREPARED STATEMENT OF ALFRED W. BLUMROSEN, PROFESSOR OF LAW AND HERBERT J. HANNOCH SCHOLAR, RUTGERS LAW SCHOOL

My name is Alfred W. Blumrosen. I am a Professor of Law at Rutgers Law School in Newark, New Jersey, and have been a member of the faculty there for thirty years. I have served as acting dean of the school. My original field of teaching and research was labor law. In the early 1960's, I analyzed the New Jersey Division on Civil Rights which enforces the state anti-discrimination law. This study was published in 1965 as "Anti-Discrimination Laws in Action in New Jersey: A Law-Sociology Study. 19 Rutgers L. Rev. 187 (1965). Partly on the basis of this study, I was asked to assist in setting up the Equal Opportunity Commission.

I served as the first director of federal-state relations, and from October, 1965 to April 1967, as the first Chief of Conciliations. I designed conciliation procedures, developed remedies for discrimination, recommended the adoption of guidelines on testing, and negotiated a number of conciliation agreements, including the agreement with the Newport News Shipyard in 1966. This agreement established that correction of discriminatory practices required revisions in entire industrial relations systems, not only the adjustment of individual claims. This principle is now basic to the apporach taken by the Courts under Title VII and the "affirmative action plans" required under Executive Order 11246.

After returning to Rutgers in 1967, I continued as a consultant to the Commission and, in the summer of 1968, served a Special Attorney in the Civil Rights Division of the Department of Justice where I assisted in litigating the first Title VII case brought by the government in the Steel Industry. In 1969, I became a consultant to Assistant Secretary of Labor, Arthur Fletcher, during the first Nixon Administration. In that capacity, I assisted in developing the Philadelphia Plan, which first established the use of "goals and timetables" as an appropriate form of affirmative action under Executive Order 11246, the various "hometown plans" which were established at that time and Order No. 4.

In 1972, I published an article entitled Strangers in Paradise: Griggs v. Duke Power Co. And the Concept of Employment Discrimination, 71 Mich. L. Rev. 59 (1972), which the Supreme Court has been kind enough to cite on two occasions. This article explains the broad concept of discrimination which has evolved under Title VIII.

In the early 1970's, I administered grants of approximately half a million dollars from EEOC and HUD to develop procedures for state civil rights agencies, and served as interim director of the Michigan Civil Rights Commission. In 1975, I adminstered a grant from the EEOC to conduct, at Rutgers Law School, a two day symposium on the tenth anniversary of Title VII.

In 1977, I returned to the EEOC as consultant to Chair Eleanor Holmes Norton. I was the EEOC representative to the committee which recommended reorganization of the EEO functions of the federal government and to the inter agency group which drafted the Uniform Guidelines on Employee Selection Procedures. I recommended the development of the Affirmative Action Guidelines. I assisted in the development of the "rapid charge processing system" which Chair Norton instituted to improve the handling of individual claims of discrimination.

I have continued my interest in the EEO field since that time, in writing, teaching and lecturing. In addition, I have represented employers, unions and workers. From 1979 through 1982, I was of counsel to Kaye, Scholer, Fierman Hays & Handler, a New York and Washington based law firm, advising employers on EEO matters. During the 1970's, when not in government service, I represented the Communication Workers of America in a class wide complaint against the Associated Press. I also assisted in representing female workers at the Uniroyal plant in Indiana, which was ultimately settled for approximately ten million dollars in benefits, after the company was debarred as a government contractor. More recently, I have represented the NAACP in an effort to secure the enforcement of Executive Order 12067 and Reorganization Plan No. 1 of 1978.

I have discussed my background to make clear that my approach to EEO matters is non-partisan and practical. I have served in the administrations of Presidents Johnson, Nixon, Ford and Carter. While each administration took a slightly different approach to specific problems, there was a continuity of overall purpose during the period from 1965 to 1980. Each administration, in its own way, treated Title VII as a charter of liberty for suppressed groups and sought to enhance opportunities for members of those groups. Given that commitment, it made little difference whether the party in power was Democratic or Republican. My basic concern is that this concept has been abandoned, and Title VII is viewed by the present adminstration as a statute with limited and narrow objectives.

As a labor relations professor and an arbitrator, I have always been concerned with the practicalities of any EEO program. I believe that fair and effective settlements are superior to litigation, and that a strongly enforced body of clearly defined law is a necessary condition for such settlements. In designing conciliation proposals for the Commission, and in drafting regulations and guidelines, I have been concerned that the programs work as a practical matter.

I have examined those policies and programs of this administration with which you are concerned from these perspectives. I have also studied the results of the first fifteen years under Title VII, to assess what we have accomplished, and how we accomplished it. One such study, entitled "Six Conditions for Meaningful Self Regulation", 69 A.B.A Jour. 1264, was awarded the Ross Prize by the American Bar Association in 1983.

My first point is that this Committee, and the entire country, should take pride in the progress since title VII was enacted, in making the promise of equal opportunity real. For example, in the year 1980 alone, nearly twenty five percent of the minority labor force were in higher level jobs than they would have held under the occupational distribution of 1965. In that one year, these minorities earned nine billion dollars more than they would have earned under the occupational distribution of 1965. Also in 1980, more than four million women held jobs in higher occupational categories than would have been the case under the occupational distribution of 1965. In 1980, they earned some twenty two billion dollars more than women would have earned under the occupational distribution of 1965. I cite these as illustrations of great progress, not as grounds for complacancy. I believe that the very improvement which the statute has brought about, has contributed to the lessening of concern for the problems of minorities and women, particularly among the younger generation which has never experienced the humiliating restrictions of discrimination. Both my studies, and the work of Herbert Hammerman in the report entitled A DECADE OF NEW OPPORTUNITY - AFFIRMATIVE ACTION IN THE 1970's published by the Potomac Institute make clear that the programs which were painfully developed during the first fifteen years under Title VII have significantly improved minority and female opportunities.

No administration has a monopoly on wisdom. Programs and policies can always be improved. Furthermore, a new administration has some "leeway" where Congress has been vague, to alter interpretations and policies adopted by a prior administration. In fact, when I returned to Washington as consultant to EEOC Chair Norton in 1977, I assisted in modifying some of the procedures which I had helped institute in 1965. Those procedures had been sound when instituted, but time and events had outmoded them. Nevertheless, given the success of the procedures and policies which were in place in 1980, the burden of persuasion that changes constitute improvement rests on those who would make them. My basic concern is this: all previous administrations treated Title VII as a charter of liberty, which was to be construed broadly to bring meaningful freedom and opportunity to members of suppressed groups. The present administration appears to view Title VII narrowly, as a technical modification of the laws which will have little social impact. This approach is neither faithful to the original intention of Congress, nor consistent with contemporary needs. From this perspective, I have reviewed the proposed changes in EEO policy which are the subject of this hearing.

1. UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

The EEOC has proposed to review the Uniform Guidelines on Employee Selection Procedures. This review was reported in the OMB statement of August 9, 1985. 1/

The Guidelines address what Judge Sobeloff called, "one of the most vexing problems touching racial justice ... [It] tests the integrity and credibility of the legislative and judicial process." 2/ The guidelines regulate the use of apparently non racial or non-sexual hiring and promotion criteria. We no longer have overtly black jobs and white jobs, or male and female jobs, as they existed in 1965. But hiring and promotion criteria which exclude minorities or women without expressly saying so, or even without the primary intention to do so, may have the same effect as overt exclusion. If Title VII required only a reform in the words used by employers, but not in the actions they took, then indeed, the law would not be credible. This is what Judge Sobeloff meant.

How, then, could the law prevent employers from changing the words, but not the music? The answer, from 1966 until now, has been to examine the results of selection standards. If those results are similar to results which would be produced by policies of restriction or exclusion of minorities or women, they they are suspect.

Such standards have a "disparate impact" on minorities or woemn. They can be justified if they are "necessary to the safe and efficient operation of business." In such a case, the needs of efficient production prevail. But if the standards are not necessary, minorities or women should not be excluded from those job opportunities at higher rates than white males. This principle runs through the thousands of technical words of the Guidelines, and hundreds court cases.

This principle works well. It has benefitted not only minorities and women, but white men as well. Consider, for example, the case of the "short cops." Before the Civil Rights Act, most police departments had minimum height requirements which screened out a higher proportion of women and hispanics than of white males. These requirements generally do not meet the test of "business necessity." The Supreme Court held that such requirements for prison guards were not "job related" in 1977.3/ Many Police Departments abandoned them. When the height requirement was dropped, it was dropped for everyone. As a consequence, there are many short white male officers at work. Each owes his job to the civil rights movement. Without this movement, these men would never have been allowed to compete for police officer positions.

This same consequence flows whenever hiring or promotion requirements are modified so that they are job related. All persons, including white males, who are hired or promoted under these job related standards are indebted to the civil rights program. Whites who are hired on the basis of a job related test might not have been hired under non-job related criteria.

Therefore, the entire society benefits from this aspect of the civil rights program.

Why, then, are the Guidelines being reviewed now? The submission by EEOC to OMB suggests two reasons. First, it is said that the Guidelines are based on the proposition that, "but for unlawful discrimination, there would not be variations in the rates of hire or promotion of people of different races, sexes and national origins." While the Supreme Court has announced a principle which goes in this direction,4/ the Guidelines do not direct that jobs be distributed throughout the country in proportion to the race, national origin or sex of the population.

A difference in rates of hire or promotion is only a starting point for an analysis of whether the tests or procedures are job related. If the rates of hire or promotion for white males are significantly higher than for women or minorities, the employer must produce evidence that his standards are valid. "Validation" is the process of determining if tests are "job related." If a test is "job related," it meets the "business necessity" standard, and is lawful despite any "adverse impact" on minorities or women.

The underlying issue in most of the selection procedure cases, is whether the employer can use a seemingly neutral factor, which may be the result of discrimination elsewhere in society, as a reason to deny jobs to minorities and women. For example, an employer in a largely white suburban area may insist that his employees all reside within a mile of his factory, to reduce tardiness. This rule will exclude minorities living in the central cities. If this rule is valid, without a showing of business need, the cycle of subordination of minorities will continue. Minorities who live in central cities send their children to relatively inferior schools. With inferior education, they cannot compete for better jobs, and cannot improve their lot in life. Similarly, if an employer can rely on inferior education, as reflected in the lack of a high school diploma or low test score, to deny a job which does not require the qualifications, then the cycle of subordination will continue.

The Supreme Court, in Griggs v. Duke Power Co.,5/held that an employer could not impose requirements which had "adverse impact," unless they were job related. The Court also made the employer's subjective "good faith" irrelevant. The objective fact of "business necessity" is what counts.

The Griggs principle that a selection procedure with adverse impact is illegal in the absence of business necessity is based on the statute. It would remain in full force and effect if the Guidelines were repealed tomorrow. However, many technical issues concerning proof of "job relatedness," would become unsettled. The Guidelines advise the regulated community how to go about validation. Without them, the issue would remain, but the guidance would be missing. The result would be confusion which could be costly to society.

The EEOC's second reason for reviewing the Guidelines is that they, "seem to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they

they should not be held to the same standards as other people, even if these standards are race-and sex-neutral." The suggestion is incorrect. The Guidelines do not assume any "inherent inferiority." They do assume that a condition of inequality has been imposed on minorities and women through a history of slavery, subordination and discrimination. This is the condition which the Civil Rights Act addressed. The Guidelines preclude the maintenance of that subordination under the guise of "neutrality," absent business necessity. Race and sex "neutral" standards which perpetuate that subordination must be justified. The EEOC statement ignores the social history which gave rise to the Civil Rights Act. The Act was intended to improve the conditions of minorities and women, not to permit continued subordination under another name.

The Act addressed more than just employment discrimination. It proscribes discrimination in most areas of life. Many so called "neutral" selection practices rely on discrimination in a non-employment area as a basis for denial of a job. This was the situation in Griggs. The employer sought to rely on inferior education of blacks as a seemingly "neutral" reason to deny a job. The court insisted on a test of "business necessity," which forces attention to business need, and away from extraneous factors which may be "carrier " of discrimination from one area of life to another. The Griggs decision, announced by Chief Justice Burger in 1971, has provided a necessary foundation for the extraordinary advance in minority and female employment opportunity in this country.6/ The Chief Justice has not been given adequate recognition for this decision. In my view, the case is as important for civil rights as Brown v. Board of Education, although it has received far less attention.7/

Thus the proposed revision of the Guidelines proceeds from two erroneous premises. It is unlikely that such a start can produce a useful product. However, the process of revising the guidelines may correct these premises. In revising the Guidelines, the EEOC must follow the procedure which was used in developing them in light of the Supreme Court decision in Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co.8/ Let me explain these procedures.

Between 1965 and 1977, the EEOC developed and issued several guidelines without going through the "notice and comment" procedure of the Administrative Procedure Act. This practice was noted critically by the Chief Justice and Justice Blackmun in 1975. Thereafter, the EEOC adopted the notice and comment procedure in developing its Guidelines. This procedure was used in developing the UGESP.9/ A draft was prepared in early 1977 and circulated informally among interest group representatives. From comments received on this draft, a joint inter-agency committee proposed a revision of the guidelines. This revision was subject to further informal discussions and was modified extensively. The revision was reviewed by the Commissioners. After they modified it, they, along with Justice, Labor and the Civil Service Commission, approved it for publication and comment. This draft was published for comment in the Federal Register in late 1977. Many informal meetings were held thereafter concerning this draft. Hundreds of written comments were received and taken into account. A public meeting and hearing was held. This process finally concluded in August, 1978, when the Guidelines as further revised in light of the comments, were adopted by all the agencies.10/ Any revision of such a carefully developed regulation should be done with this same care and consideration.

It is now October, 1985. The EEOC proposed to present a revision of the Guidelines for a Commission vote by February, 1986. History suggests that this timetable is impossible if there is to be adequate public consultation. Work on the Uniform Guidelines was begun in June, 1977 and concluded in August, 1978. The EEOC now proposes more substantial changes that were made in the 1978 Guidelines. I do not see how it could possibly go through consultations and the "notice and comment" process by next February.

I suggest that the Committee inquire whether the EEOC plans to submit the proposed revisions for informal consultation and then for "notice and comment," and if so, whether a copy of the present draft proposals is available.

II. STATISTICS AND DISCRIMINATION

The relation between statistics and discrimination has become befogged by uncertainty and technicality. Some of this uncertainty affects the proposed revisions of the Guidelines, and some affects the general approach of the EEOC to identification of discrimination. Some clarification is in order.

First, statistics may suggest discrimination. An employer with 50% female employees but no female managers, invites examination. Why is this the case? Suppose that a female employee of this employer is denied a promotion to manager. The statistics suggest that this employer may be excluding women from managerial positions. Her individual case of discrimination is strengthened by these statistics.11/

Secondly, statistics may suggest equal opportunity. An employer with a 50% minority work force has a substantial number of minority managers. A minority worker claims discrimination whe he is denied promotion to manager. The employer's denial of discrimination is more credible because the statistics demonstrate that minorities have been promoted. They suggest that the employer is unlikely to reject a candidate on racial or national origin grounds.12/

The alternative to this method of identifying both discrimination and equal opportunity is to rely on protestations of good faith by employers. This approach was used in the period before Title VII. It is likely to fail for several reasons. First, the evidence of "good faith" can be developed by the employer itself, in policy statements and other "postures." Secondly, probing the motives of individuals is difficult under the best of circumstances. People no longer admit discrimination, and records are purged of incriminating statements. Almost all personnel actions are undertaken with an apparent "legitimate non-discriminatory reason." The statistical context in which these statements are made provide a reliable guide to deciding whether to believe the employer.

The UGESP states that certain statistics suggest adverse impact and require the employer to demonstrate business necessity. If the hire or promotion rate of minorities or women is less than 80% of the rate for white men, the UGESP states there is probably adverse impact. Practical guidance of this type is important to the employer community. Without it, there is great undercertainty and risk that an employer will be subjected to liability without having the opportunity to revise its practices. The practices of employers and courts under the guidelines demonstrate that the system does work and is managable. See for example, the case reported last week, Clady v. County of Los Angeles.13/

In this approach, the records of how systems work are essential. The maintenance of statistics by an employer who has avoided adverse impact is important for its defense against title VII claims. The EEOC should not cut the employer off from the use of this evidence. If the EEOC does not require the employer to keep the statistics, the fact that they are kept will be argued to be evidence of discrimination. Thus the required keeping of such records is important for employers as well as for complainants.

As the Hazelwood case suggests, statistics are useful evidence of discrimination, even though Title VII does not mandate a work force which is race and sex balanced.14/ Statistics enable an employer to know whether his employment pattern appears fair, or whether some affirmative steps are in order.15/ They are also useful to government in identifying those employers whose employment of minorities and women falls below the pattern of other employers in the same labor market and same general industry. I have long advocated the use of such STATISTICS TO IDENTIFY EMPLOYERS WHO should be examined for possible discrimination. Where some employers have hired and promoted minorities and women successfully, it is reasonable to ask other similarly situated employers why they have not done so. These considerations focus on the results of employment practices, rather than the intent of the employer. But this is a far cry from the notion that the law requires "equal results." It requires only that unequal results be justified.

III. THE FEDERAL EEO PROGRAM

The EEOC submission to OMB suggests that the EEOC will eliminate the requirement in Management Directive 707 that federal agency affirmative action programs contain "goals and timetables" for recruitment and hiring of minorities and women who are underrepresented in the federal service.

This proposal may violate 5 U.S.C. 7201, otherwise known as the "Garcia amendment," to the Civil Service Reform Act. That amendment adopts, for the federal service, the approach used in Executive Order 11246, to affirmative action. It defines "underrepresentation" to mean "a situation in which members of a minority group... within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the minority constituted within the labor force of the United States..." It then requires a recruiting program to be directed to "eliminate the underrepresentation." It requires the EEOC to establish guidelines to carry out the program, make determinations of underrepresentation, and to transmit these determinations.

This is the same basic process required of government contractors under Executive Order 11246. Thus the establishment of goals and timetables for federal agency affirmative action programs follows the path of precedent. Perhaps there are other ways of accomplishing the Congressional objective. But the EEOC suggests that this objective will be ignored. This Committee should be concerned if a proposed regulation appears to disregard the will of Congress. I believe the Committee should examine the proposed revision, which was supposed to be ready in September, 1985, to determine if it violates the Civil Service Reform Act.

IV. GOALS AND TIMETABLES: THE ABDICATION OF THE EEOC

In 1978, the President proposed and Congress later ratified a Reorganization Plan which gave EEOC the duty to coordinate federal EEO programs. The Plan was implemented by Executive Order 12067, which assigned to EEOC the "leadership" role among the federal agencies. In 1979, the EEOC, in the exercise of this authority, adopted the Affirmative Action Guidelines.16/ These guidelines approve "goals and timetables" to avoid the adverse impact and to avoid other possible findings of discrimination. They also support those employers who use goals and timetables under Executive Order 11246. The AA Guidelines are in full force today. Thus the official position of the EEOC supports goals and timetables when they are used appropriately.

This is not the policy of the Department of Justice. That Department has opposed the concept of goals and timetables. It sought to use the Stotts of last year as an excuse to revoke goals and timetables in consent decrees to which it is a party. The EEOC sat quietly by while an agency which is supposed to conform to its policy, adopted and implemented one which is totally inconsistent. This inconsistency in federal policy is precisely what Congress sought to avoid when it assigned coordination authority to the EEOC.

There were several reasons why Congress and the President placed this responsibility in the EEOC in 1978. Certainly, Congress and the President had confidence in Chair Eleanor Holmes Norton. In addition, the EEOC had begun to make policy in the sunshine, using the "notice and comment" procedure of the Administrative Procedure Act, so that all concerned could participate. The EEOC is a bi-partisan body. The development of its policies take place in an arena in which differing views are expressed. The result is more likely to meet public consensus than the expressions of an agency which is not so constituted. Finally, the EEOC has the specific mission of improving minority and female opportunity, while the other agencies involved in EEO - Justice, Labor and OPM - have many other functions.

Since 1981, the EEOC has not exercised its leadership role. There is confusion in the land today as a result of the aggressive posture of the Justice Department against "goals and timetables" as compared to the continued existence of the Affirmative Action Guidelines at EEOC and the uncertainty about Affirmative Action requirements at the Labor Department. Congress and the President intended that EEOC resolve these matters. I recommend that the Committee inquire into why this situation has been allowed to develop.

Let me emphasize that, even if the President rescinded Executive Order 12067, the responsibility for coordination would still rest with EEOC, because the Reorganization Plan has the effect of an Act of Congress. This assignment of responsibility cannot be changed by Presidential fiat or administrative usurpation.

If the EEOC moved to modify the Affirmative Action Guidelines, they would be required to follow the "notice and comment" procedures which assure public participation in rulemaking. I am sure that it would be discovered, in that process, that most Americans approve the concept of affirmative action, and the use of goals and timetables where there is need to assure equal opportunity.

With respect to the merits of the goals and timetables program, let me say only the following: (1) the concept has been of great assistance in improving the opportunities for minorities and women. (2) The concept does not lead to a mechanical allocation of jobs by race and sex; (3) the concept is self limiting, in that the need for such programs will decline as the program is successful. We have made great strides, but are not yet at the point where such programs should be abandoned.

In essence, "goals and timetables" counterbalance the "tilt" against the hiring and promotion of minorities and women. This "tilt" is no longer expressed through direct exclusion. It exists in more subtle judgments about the capabilities of minorities and women. The Goals and Timetables program responds to this "tilt" by requiring that genuinely fair employment practices are used. It is consistent with the concept that equality of opportunity must be realized in fact as well as in rhetoric. This does not mean "equality of results" as some suggest. It does mean that the "tilt" against minority and female opportunity must be countered so that discriminatory factors are screened out. At that point, the industrial relations system should function fairly without extensive governmental intrusion.

For example, the most common recruitment method is "word of mouth" spreading of job information among friends of employees. Where the work force is all white, this approach is discriminatory because it tends to confine the information to whites. But, after affirmative recruiting and hiring of minorities, "word of mouth" method becomes a fair way to recruit, because job information is shared by members of all racial groups. At that point, the system can work fairly, and without governmental intervention.17/

Unfortunately, the actions of the present administration, taken collectively, reject the concept that the Civil Rights Act is a charter of liberty to be construed liberally. The administration seeks to reduce it to a technicality. This is a fundamental mistake. The statute was not drawn with a narrow concept in mind. It is a major statement about freedom in America. It is ambitous challenge to the residue of slavery and the subordination of women. These phenomena are as old as civilization. We have done remarkably well in advancing individual freedom in the twenty years since its passage. We are now faced with this "last ditch" effort to limit these freedoms. For example, the recently revised case processing system at EEOC appears to reflect a narrow view of the Act.

V. THE NEW EEOC CASE PROCESSING SYSTEM

The original EEOC case processing system required a full examination of all discrimination related to a charge filed by an individual. Conciliation was attempted only after a written finding of reasonable cause. This system, which I recommended in 1965, was appropriate when few individual complaints were expected, and the EEOC had not developed a program to address patterns of discrimination.18/ However, it bogged down under thousands of complaints. By the mid 1970's, it had produced a terrible backlog of cases. A complaint might not be investigated for three years after it was filed. This was bad for complainants and for employers. Many complainants became discouraged and simply disappeared. Those who perservered sought large back pay awards to cover the long period when the EEOC was not processing their case.

To address these problems, Chair Norton introduced the Rapid Charge Processing System in 1977. Under that system, efforts to settle cases promptly were made as part of a fact finding conference. These conferences were called within a short time after the complaint was filed.19/ Settlement rates soared. Individuals secured relief in matters which, had they lingered for years, could not have been resolved.

Consider, for example, the alleged discriminatory discharge of an employee earning $300 a week. If the EEOC can get to settlement discussions in three months, the maximum back pay liability will be 300 x 12 weeks, or $3,600. This amount can be compromised between employer and employee if settlement is otherwise possible. Take the same case, except that the parties wait two years before discussing settlement. Now, there is $300 x 104 weeks, or $31,200 of potential back pay liability. The worker, if he or she had not found another job, will want a substantial money settlement. The employer will be likely to resist a large payment. The delay will in many instances change the outcome, often in a manner which disserves the worker, but sometimes at great cost to the employer. If the case does not settle early, it may never settle. The workers may not pursue it. If it is pursued, management may decide to spend the $30,000 defending the case. It may win or lose. Thus, at the end, as a result of delay, the lawyers win, not workers or employers. This is not the way to assure Equal Employment Opportunity.

Yet the EEOC is now embarked on a course which depreciates the Rapid Charge Processing System as "claims adjustment," rather than "law enforcement." This distinction is unsound. There is nothing inappropriate about "claims adjustment." As Justice O'Connor has said, the victims of discrimination want jobs, not law suits.20/ Yet the procedures announced in February appear to lead toward lawsuits, not jobs.

The EEOC will look for the intentional discriminator, possibly instead of the policy or practice of discrimination. In the search for the " bad employer," the Commission may disregard general policies that discriminate. This policy guarantees a difficult and prolonged investigation, as managers deny that they intentionally discriminated. Furthermore, since the EEOC may seek to remove a manager, he or she has major incentive to defend against a discrimination charge rather than to settle it. The EEOC position may drive a wedge between the manager and the employer. The employer may be willing to settle, but the manager may resist because his or her personal future may be implicated. The proposed requirement that a notice be posted surely will be resisted as an invitation to workers to invade the corporate treasury.

I think the result of this "new system" will be less relief for complainants, and more work for lawyers. There will be inevitable delays and fewer settlements. This is the wrong thing to do. The direction of this change, as I indicated earlier, is toward a narrow view of the statute, which is incompatible with the vision of the Congress in 1964. The Commission should experiment with the new procedures in selected offices, before putting them into effect across the country. This was done by Commissioner Norton before she instituted the Rapid Charge Processing System. A fair test of these new procedures should be undertaken before such a drastic charge is imposed on the entire system.

Finally, there is inconsistency between this case processing policy and the planned revision of regulations under the Age Discrimination Act.21/ The case processing policy will make settlements more difficult, while the proposed revision in Age

Discrimination regulations would encourage settlement, by permitting "unsupervised" agreements. The Commission should be consistent, and follow the legislative policy favoring voluntary informal settlement of discrimination disputes.

VI. NEEDED: ADDITIONS TO THE CIVIL RIGHTS AGENDA

While I have criticized some of the proposed changes in civil rights policy of the present administration, I do not mean to suggest that the traditional civil rights agenda, which was forged in the 1940's, is itself adequate for our times. We must recognize that conditions are better for some now, mainly as a result of civil rights laws. These new times require a broadened approach to civil rights and affirmative action. I urge the Committee to use its good offices to encourage the development of this additional agenda.

Let me briefly suggest some elements of this agenda. They are based on the recognition that many minorities and women are now in the middle class, and need, as do all members of the middle class, protection to insure that they can enjoy the fruits of their labors. This administration is disinterested in this total group, and no one seems to be speaking for them. The Civil Rights Movement could become their representative, thus benefitting the entire society.

This agenda would take civil rights concerns into new areas. For example:

1. Tax Policy.
    A. Raise the lowest tax brackets, rather than giving further relief to the rich.

B. Exclude 50% of interest and charitable contributions from [redacted] NET income of those in the lower tax brackets. The present law makes it cheaper for the rich to borrow money and make charitable contributions than the rest of us.

2. Tariff policy: relate tariffs to a requirement of improvement in the condition of workers in other countries.

3. Law Enforcement Policy: insist on full and fair police protection for the lives and property of minority citizens.

4. Full Employment Policy: reduce the normal work week to 32 hours. This will create 5 million jobs.

I have discussed these ideas, and some others, in an article entitled Expanding the Concept of Affirmative Action to Address Contemporary Conditions published in the New York University Review of Law and Social Change.22/ A copy is attached for your consideration.

This Committee has been instrumental in the progresss of the past twenty years, both in securing the passage of statutes and in overseeing their implementation. I am sure it will not only assist in maintaining the gains won up to now, but will encourage the civil rights community to embrace the new opportunities created by past success. Thank you

1. "Regulatory Agendas of Department of Labor and EEOC," Daily Labor Report, Aug. 9, 1985, p. D-1.

2. Griggs v. Duke Power Co., 420 F.2d 1225, 1247 (4th Cir. 1970).

3. Dothard v. Rawlinson, 433 U.S. 321 (1977). Defendant prevailed in that case because the exclusion of women from the specific prison situation was held to be a bona fide occupational qualification.

4. Hazelwood School District v. United States, 433 U.S. 299 (1977): "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Sec. 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population."

5. 401 U.S. 424 (1971).

6. Blumrosen, The "Law Transmission System" and the Southern Jurisprudence of Employment Discrimination, 6 Indus. Relations L. Jour. 313 (1984).

7. Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59 (1972).

8. 103 S. Ct. 2856 (1983).

9. See Blumrosen, The Binding Effect of Affirmative Action Guidelines, 1 Labor Lawyer 261 (1985).

10. See Blumrosen, The Bottom Line in EEOC Guidelines: Administering a Polycentric Problem, 33 Ad. L. Jour. 323 (1981). For a detailed discussion of the Evolution of one section of the UGESP.

11. McDonnell Douglas v. Green, 411 U.S. 792 (1973).

12. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978).

13. (9th Cir. 1985) Daily Labor Report, 9-24-85, p. D-1.

14. See note 4, supra.

15. See "Businessmen like to hire by the Numbers," Fortune, Sept. 16, 1985, p. 26.

16. 29 CFR 1608. See Blumrosen, The Binding Effect of Affirmative action Guidelines, 1 Labor Lawyer 261, 267-270, 274-276 (1985).

17. See Blumrosen, The Duty of Fair Recruitment under the Civil Rights Act of 1964, 22 Rutgers L. Rev. 465 (1968); reprinted, Blumrosen, Black Employment and the Law, 218 (1971).

18. See Blumrosen, Black Employment and the Law, 83-92 (1971).

19. For a discussion of the background of the rapid charge processing system, see Blumrosen, Strangers No More: All Workers are Entitled To "Just Cause" Protection Under Title VII, 2 Indus. Rel. L. Jour. 519, 528-536 (1978).

20. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).

21. Proposed Revision of 29 CFR 1627, Daily Labor Report, July 23, 1985, p. A-7.

22. 13 N.Y.U. Rev. L.and Soc. Change 297 (1984-85)

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Expanding the Concept of Affirmative Action to Address Contemporary Conditions

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EXPANDING THE CONCEPT OF AFFIRMATIVE ACTION TO ADDRESS CONTEMPORARY CONDITIONS

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INTRODUCTION

Today's civil rights program was shaped more than thirty-five years ago by a Presidential Committee report.[1] The social and economic conditions of minorities and women have so improved since then, that a fundamental reexamination of the civil rights program and its handmaiden, affirmative action, is now in order.

The Truman Committee Report of 1947 identified racial discrimination in employment by reference to three socio-economic indicators: relative occupational distribution, relative unemployment rate and relative income level.[2] These indicators changed little from the end of World War II to the passage of the Civil Rights Act of 1964.[3] Since 1964, one of these indicators — occupational distribution — has improved dramatically. Millions of minorities and women are now in better paying, higher status jobs than they would have held under the pattern of occupational distribution of 1965.[4] This improvement requires that we expand our basic thinking about civil rights and affirmative action and helps to explain the diminution in public, political, and official support for these programs.

The first twenty years under the Civil Rights Act were devoted to opening opportunities. The emphasis in the future may be on making those opportunities meaningful in human terms, assuring minorities and women that they can enjoy the newly won fruits of their labors. To achieve this objective, the civil rights movement will have to join — or rejoin — those who are concerned with the enhancement of individual freedom, dignity, and opportunity in fields which are "new" to the civil rights movement. It will no longer be sufficient to press the traditional concepts of affirmative action. The civil rights movement must become concerned with tax, tariff, antitrust, educational policies and protection by the criminal law.

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[1] President's Committee on Civil Rights, To Secure These Rights (1947).

[2] Id. at 53-61.

[3] A. Blumrosen, Black Employment and the Law, 271-92 (1971) [hereinafter Black Employment].

[4] More detailed data appear in Blumrosen, Six Conditions for Meaningful Self Regulation, 69 A.B.A. J. 1264, 1267 (1983) [hereinafter Six Conditions]; Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 Indus. Rel. L. J. 313, 333-40 (1984) [hereinafter Law Transmission].

An expanded approach to civil rights issues is dictated by the extensive socio-economic changes since 1965. The extent of these changes is suggested by Table I.

TABLE I
RATIO OF MINORITY TO WHITE PARTICIPATION RATES IN STANDARD OCCUPATIONAL CATEGORIES, 1950-1980[5]

Job Category	1950	1965	1980
Officials/Mgrs.	21.5	23.4	43.3
Prof./Technical	37.5	52.3	77.0
Sales	17.3	26.7	42.6
Clerical	25.3	50.3	98.9
Crafts (skilled)	35.0	49.6	72.2
Operatives (semi-skilled)	90.2	117.0	143.7
Laborers (unskilled)	282.0	282.0	160.5
Service Wkrs.	233.3	218.3	176.1

Since 1965, the proportion of minorities in the "officials/managers," "professional/technical," "clerical," and "crafts" job categories has moved rapidly toward the proportion of whites in those categories. Simultaneously, the excessive concentration of minorities in "operatives," "laborers" and "service" categories has been reduced. Thus, the image of a minority worker as essentially performing hard labor in a white-dominated employment system has been blunted by the history of the last fifteen years.

In addition, the minority and female share of total employment has increased. In 1965, minorities constituted 10.7% of an employed labor force of 72 million; in 1980, they constituted 11.2% of an employed labor force of 97 million.[6] Thus, nearly half a million more minorities were at work in 1980 than would have been at work under the labor force participation rates of 1965. In 1965, females accounted for 34.8% of the labor force; in 1980, they accounted for 42%. Nearly four million more women were at work in 1980 than would have been at work under the 1965 participation rate.[7] Women achieved significant improvement in their occupational status as well.

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[5] Six Conditions, supra note 4, at 1267; Law Transmission, supra note 4, at 335; Data for 1950-1965, U.S. Bureau of the Census, Statistical Abstract of the United States: 1966, at 229 [hereinafter Statistical Abstract 1966]; Data for 1970-1980, U.S. Bureau of the Census, Statistical Abstract of the United States: 1981, at 400 [hereinafter Statistical Abstract 1981].

[6] Statistical Abstract 1966, supra note 5, at 229; Statistical Abstract 1981, supra note 5, at 402.

[7] See note 5 supra.

TABLE II
CHANGE IN OCCUPATIONAL DISTRIBUTION AND INCOME OF MINORITY AND FEMALE WORKERS IN 1980 COMPARED TO THAT WHICH WOULD HAVE EXISTED UNDER THE OCCUPATIONAL DISTRIBUTION OF 1965

Job Category	Change in Numbers of Employees[8]		Change in Gross Mean Earnings[9]	
	Minority	Female	Minority	Female
Officals/Mgrs.	283,140	1,016,135	4,352,145,000	12,588,896,515
Prof./Technical	642,510	1,371,608	9,351,090,500	16,056,043,248
Sales	108,900	−346,360	783,100,000	−1,999,241,868
Office/Clerical	1,110,780	1,445,960	9,424,968,300	11,761,438,640
Craft (skilled)	315,810	291,993	3,811,195,000	2,715,251,276
Operatives (semi-skilled)	−206,910	−1,942,332	−1,984,473,800	−13,883,789,136
Laborers	−631,620	352,812	−4 390,390,600	2,207,191,872
Service except household	−935,540	−1,711,483	−5,697,178,500	−8,242,502,128
Farm	−686,070		−3,850,224,800	

In 1980 alone, minorities received nearly nine billion dollars more in wages than would have been the case under the occupational distribution of 1965; women received nearly 22 billion dollars more. The increased wage incomes to minority and female workers totalled at least 25 billion dollars in 1980 alone. This pattern of improvement established between 1965 and 1980 continued through 1982 according to more recent statistics.[10]

The Equal Employment Opportunity (EEO) programs have improved access to and participation in higher level jobs for minorities and women. Yet there seems to have been a "conspiracy of silence" about this development. Opponents of affirmative action have no interest in acknowledging its success. And some supporters fear that recognition of success will justify reduction in support for such programs.

Nevertheless, it is important to recognize that the situation of minorities and women in the 1980's is substantially different—and better—than in 1965. This improved condition of minorities and women helps to explain the decline in public support for civil rights issues; it makes the rhetoric of the 1960's sound hollow. An understanding of the dimension of this change is necessary if we are to implement programs that will make as much sense for the next era as did the programs of the 1940's which were implemented in the 1960's.

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[8] See notes 4 and 5 supra.

[9] See Current Population Reports, Series P-60, No. 129, U.S. Bureau of the Census, Money Income of Families and Persons in the United States: 1979 (1981).

[10] U.S. Bureau of Labor Statistics, Statistical Abstract of the United States: 1984, 417 [hereinafter Statistical Abstract 1984].

Because of the success of affirmative action programs, it now becomes necessary to ensure that those minority and female workers with improved job situations enjoy the fruits of their labors. In pursuing this objective, the civil rights movement may find new common ground with other sectors of society such as whites/males who are in comparable situations, and thus generate anew more general public support for civil rights objectives.

This article will suggest a concept of affirmative action which relates the experiences of the past — both the successes and the failures — to the needs of the future. Part I addresses conventional affirmative action issues. Part II addresses "new" areas in which the civil rights movement should become involved, including taxation, tariff, antitrust, education and protection of persons and property through criminal law.

I

TRADITIONAL AFFIRMATIVE ACTION

A. Occupational Distribution — The "Goals and Timetables Issues" in Modern Perspective

The function of the "goals and timetables" program of the 1970's was to insure the inclusion of minorities and women in jobs from which they had traditionally been restricted or excluded. The success of the approach is manifest in the statistics in Table I, *supra*. It is obvious that goals and timetables are no longer needed as an overall macro-legal program for minority office and clerical workers; however, such a program may be necessary in the case of individual employers who engage in discriminatory recruitment and hiring.

The remaining job categories where a program of goals and timetables should generally be used, for a limited time, include officials and managers, professional and technical jobs, and sales and craft jobs. The length of time during which goals programs should remain in effect is uncertain. There is no general need for a goals program when the proportion of the minority work force in a given occupational category comes close to that of whites. A decade ago, I urged that a discussion of the issue as to when "quotas" should be discontinued from being used be undertaken.[11] Such a discussion never occurred because the opponents of goals did not want them used at all, and the supporters of the program did not want to discuss a stopping point when conditions were, in their view, so bad. The need to consider this question is sharpened by the Reagan administration's attack on goals and timetables. The goals programs should continue only until the proportion of the minority or female labor force in a job category approaches the proportion of whites/males. As an operational or practical application of this view, the adoption of the "80% rule" set forth in the Uniform Guidelines on Employee Selection Procedures would be appropriate.[12] If the "80% rule" determined when, in general, goals and timetables should be phased out, we would soon see the end of such programs in most job categories. Thus, goals programs would remain in place for officials, managers, professional and technical workers and craft jobs.

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[11] Blumrosen, Quotas, Common Sense and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675, 678 (1974) [hereinafter Quotas].

This approach may be criticized. How can we abandon the goals program while the minority unemployment rate remains double that of whites? The answer is that while the goals program seems to have had little impact on minority unemployment, in actuality the minority "share" of all jobs increased during the 1970's. It is because of increases in the minority population and labor force participation, that the minority unemployment rates have remained double that of whites.[13] Considering these circumstances, it is doubtful that the equal employment laws can significantly affect the relative unemployment rate. An alternative approach to the unemployment problem—reduction of the normal work week—will be discussed in the next section of this article.[14]

The officials, managers, professional, technical and craft jobs for which a goals program should be maintained involve a high degree of discretion in both performance and evaluation. They are not well suited to the one-on-one litigation under Title VII. The job specifications are vague and general; performance expectations are uncertain; therefore, performance evaluation is difficult and subjective.[15] Under these conditions, the outcome of one-on-one litigation is more apt to resemble Russian roulette than the reasoned application of social policy. Therefore, a general requirement that minorities and women be included in these categories, leaving the details to be worked out by those in control of the workplace, may be more appealing to unions, management and the civil rights movement than a search for identifiable victims of individual acts of discrimination.[16]

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[12] Uniform Guidelines on Employee Selection Procedures 1978, 29 C.F.R. §§ 1607.3-.4(D) (1978); See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The government uses the Guidelines to identify those employee selection procedures which have an adverse impact on minorities and women. If the proportion of minorities and women who pass the employee selection procedure is at least 80% of the proportion of white/males who pass, then the government will generally not find "adverse impact." If the procedure does not meet the "80% rule" it is considered to be discriminatory and in violation of Title VII unless the employer can establish business necessity or the test's validity. While the rule has its critics, it does provide a practical "on site" method of making an important assessment as to the possible illegality of a selection procedure.

[13] Blumrosen & Culp, Reducing the Workweek to Expand Employment: A Survey of Industrial Response, 9 Empl. Rel. L.J. 393, 407-08 (1984) [hereinafter Survey].

[14] See notes 31-36 and accompanying text infra.

[15] See Valentino v. United States Postal Serv., 674 F.2d 56, 64-69 (D.C. Cir. 1982) (denying both individual and class claims, and noting the difficulty of an objective selection process for promotions to high-level management positions); Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947, 959-64 (1982) (explaining judicial reluctance to review high-level decision-making).

[16] There may indeed be individual victims for whom Title VII will provide relief, but to

This approach assures that goals and timetables will not be continued so as to divide the work force along lines of race and sex on a mechanical basis. Proportional representation in the workplace is neither possible under the principle of the *Weber* case[17] nor under the EEOC Affirmative Action Guidelines.[18] It had been theoretically possible under the Labor Department Compliance Manual during the Carter administration.[19] However, this manual was directed primarily at the job categories of sales, professionals, and officials/managers, where, at the time, there was "far to go" before proportionality became a real possibility.

The cloudy legislative history of the "anti-preference" provision of Title VII[20] makes clear only that Congress did not want a mechanical allocation of jobs along race, ethnic and sex divisions.[21] Within that framework, it remains appropriate to utilize goals to correct traditions of restriction and exclusion of disadvantaged groups. Group claims are asserted to redress a history of exclusion of individuals because of their membership in the group. As the consequences of group exclusion decline, the need for recognition of group claims also declines.[22] But we must continue to recognize group claims where the group as a whole continues to suffer the consequences of repression. Otherwise, we accept the subordinate status of minorities and women that Congress has rejected.[23]

Employers generally adopt and implement goals programs when they are assured that they need not employ unqualified personnel. They prefer to use qualification standards of their own choosing rather than only those which pass muster under the Uniform Guidelines on Employee Selection Proce-

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confine affirmative action to remedying such individual discrimination (the 1984 Justice Department policy) is either to restrict affirmative action unduly in situations of uncertainty, or to force extensive litigation over the discrimination issue, when settlement would otherwise be possible. Such results would appear to conflict not only with United Steelworkers v. Weber, 443 U.S. 193 (1979), reh'g denied, 444 U.S. 889 (1979) (holding a voluntary affirmative action plan to be within congressional intent), but also with the thrust of the decision in Ford Motor Co. v. EEOC, 458 U.S. 219, 228-30 (1982) (limiting back pay liability so that employer has incentive to hire Title VII claimants), as well as EEOC Affirmative Action Guidelines, 29 C.F.R. § 1608 (1979) (§ 1608.1 stresses the need for voluntary action without litigation). The decision in Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) is not to the contrary. *Stotts* holds only that bona fide seniority systems are not subject to revision under Title VII. See Justice O'Connor's concurring opinion at 2592.

[17] *Weber*, 443 U.S. at 208 (noting that voluntary affirmative action plan was "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance").

[18] 29 C.F.R. § 1608 (1984).

[19] Federal Contract Compliance Manual, § 2.190.1(a) (1979).

[20] 42 U.S.C. §2000e-2(h) (1982); § 703(h) of Title VII.

[21] Blumrosen, The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of *Connecticut v. Teal*, 20 Harv. J. on Legis. 99, 114 (1983) [hereinafter Group Interest]; Quotas, supra note 11, at 692; see also note 16 supra.

[22] See Law Transmission, supra note 4, at 337 (distinguishing second generation cases, in which discriminatory patterns are no longer clear, from first generation cases, in which the practices are easily identified).

[23] See Group Interest, supra note 21, at 116.

dures.[24] The "bottom line" theory of Title VII would have permitted the employer to do this if they included adequate numbers of minorities and women.[25] But the Supreme Court may have, mistakenly, unduly limited this option.[26]

The Reagan administration's opposition to goals is both internally inconsistent and legally unsound. The use of goals and timetables has been opposed by the government in petitions for certiorari to the Supreme Court;[27] however the government has not rescinded the regulations under which they are required and protected. Department of Labor Regulations requiring goals and timetables are still in effect, as are EEOC Guidelines protecting employers who take affirmative action. These regulations have the force of law and the Justice Department should be bound by them unless, and until, they are changed pursuant to the Administrative Procedure Act.[28]

Why has the Reagan administration not rescinded these regulations if it is opposed to goals and timetables? The answer may lie in the interstices of administrative law and politics. To rescind these guidelines would require formal government action, including at least "notice and comment" procedures by the OFCCP and the EEOC. Since the guidelines and regulations involve both race and sex discrimination, their change would restrict women's rights. This would pour oil on a fire which the administration would rather dampen.

To avoid this problem, the "quota" issue has been argued in the only forum in the United States where different standards are applied to race and sex matters: the judiciary. The Supreme Court has labeled race a "suspect" classification, and government action based on racial classification must undergo "strict scrutiny." Sex is not a "suspect" classification and therefore government action based on gender is subject to a lesser degree of review.[29] Given this double standard, the gender aspects of affirmative action programs may survive while the race aspects may fail. At the least, there is a technical justification for the government to challenge only the race aspects of the affirmative action program.

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[24] 29 C.F.R. § 1607.14 (1978) sets out detailed standards for validation of tests and other selection procedures.

[25] Blumrosen, The Bottom Line in Equal Employment Law: Administration of a Polycentric Problem, 33 Ad. L. Rev. 323 (1981).

[26] See Connecticut v. Teal, 457 U.S. 440 (1982) (criticized in Group Interest, supra note 21).

[27] See, e.g., Petitions in Support of Certiorari, Bratton v. City of Detroit, No. 83-551 (Oct. Term 1983); Boston Firefighters Local 718 v. Boston Chapter, NAACP, No. 82-185, 246, 259 (Oct. 1983); Firefighters Local No. 1784 v. Stotts, No. 82-206, 279 (Oct. 1983). See also Reynolds, Justice Department Policies on Equal Employment and Affirmative Action, in Proceedings of N.Y.U. 35th Annual National Conference on Labor 443 (R. Adelman ed. 1983).

[28] 5 U.S.C. § 553. See Blumrosen, The Binding Effect of Affirmative Action Guidelines, paper presented at the Section on Labor Employment Law, A.B.A., May 4, 1984, New Orleans, La., reprinted in Daily Lab. Rep., May 8, 1984, at D1 (to be published in revised form in a forthcoming issue of The Labor Lawyer, a new publication of the Labor and Employment Law Section, A.B.A.) [hereinafter Binding Effect]. See also Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866-67 (1983).

[29] See, e.g., Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272-74 (1979).

I do not know if this is in fact the strategy of the Reagan administration. In any event, the Supreme Court should not become entangled in such political machinations. It should require the executive branch to get its own house in order, in a manner which complies with the Administrative Procedure Act.[30]

B. Unemployment and the Thirty-Two Hour Work Week

Minority unemployment rates remain about double of white unemployment rates; and minority teenage unemployment rates in urban areas reach levels above 50%.[31] This suggests that the overall share of jobs going to minorities has not improved during the past fifteen years. In fact the minority share of all jobs has increased during this time.[32] If the minority population had remained at about 11% of the total population, as in 1965, we would have seen a sharp drop in the relative unemployment rate. This did not happen. The minority baby boom of the fifties and sixties increased the minority proportion of the population to its present 17-18%, with large numbers concentrated in their teens and early twenties. The result is that the improved employment of minorities after the Civil Rights Act did "solve" the problem as it had existed in 1965, but the population mix has so changed that the relative unemployment rate is now as high as it had been in 1965.

We may consider three approaches to the minority unemployment problem for the coming period: hire according to affirmative action plans; reduce our social commitment to the "work ethic"; or create additional employment.

First, there is little reason to believe that continued affirmative action hiring will seriously affect the relative unemployment rate since it took from 1965 to 1980 to increase the minority share of the labor force by less than one percent. While this represented nearly half a million jobs, it did not absorb the excess of minority unemployment. Nevertheless, continued pressure for affirmative action may be useful to prevent backsliding and to insure that specific employers recognize their social responsibilities.

Second, we cannot reduce our emphasis on the work ethic despite government efforts supporting this approach.[33] The elimination in 1981 of the tax advantage that "earned income" had over "unearned income" suggests that an individual in the higher tax bracket might as well manipulate her financial affairs rather than perform what is traditionally considered "work." Similarly, the welfare system, as currently administered, may reduce work incentives. Deemphasizing the work ethic through such policies is inappropriate as a general proposition. We operate in a world where there are millions, if not billions of people, who would find working at our most menial jobs a vast improvement in their condition of life. Further, our own economic needs require continued attention to productivity.

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[30] 5 U.S.C. § 553. See Binding Effect, supra note 28.

[31] Blumrosen & Culp, supra note 13, at 401.

[32] See note 5 supra.

[33] See generally The Work Ethic — A Critical Analysis (J. Barbash, R.J. Lampman, S.A. Levitan & G. Tyler eds. 1983).

Therefore, job creation is the only alternative left to alleviate minority unemployment. Since our efforts to create jobs in the public sector have not been successful, we should seek to create new jobs in the private sector. Requiring employers to pay time and a half for hours worked after thirty-two hours would create millions of new jobs, a good many of which would be part-time.[34] These jobs would create new avenues of entry and experience for youth including minority youths, for those who wish to join the world of employment without relinquishing their roles as parents, and for older workers who wish to slow down but not be tossed onto the industrial scrap heap.

Rutgers Law Professor Jerome Culp and I recently surveyed industrial relations personnel as to their probable response to the "32 hour work week." The survey strongly suggests that the primary response of employers to the 32 hour work week would be to reduce the hours of presently employed personnel. These employers would make up for the lost hours by hiring part-time personnel, who would then provide the primary pool from which future full-time workers would be hired.[35] We estimated that this approach would create some five million full- and part-time jobs.[36] This would reduce unemployment to less than half of its current figure.[37]

Some supporters of affirmative action have responded cautiously to this proposal. Their concern is that minorities and women would be locked into "second class" part-time jobs, thereby perpetuating the division between the haves and have-nots in the labor force. While pre-Civil Rights Act history would justify this concern, it is not justified under current conditions. Virtually all of the employers surveyed indicated that they would draw full-time workers from their part-time employees. Their failure to do so would be discriminatory to the extent that they neglected a source of minority and female workers. Finally, common sense indicates that an employer would prefer to make a full-time worker of a part-time worker whose work was satisfactory rather than hire an unknown.

Objections from other quarters also exist. Some workers, whose employers reduced their hours to thirty-two, would take a cut in pay. This is true, but not as drastic as it first appears. The average work week now is approximately thirty-five to thirty-six hours, not forty hours. So the pay cut which would result is no more than 10%, reduced by a smaller tax bite, by fewer work preparation expenses, and by the value of the additional free time.

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[34] Blumrosen & Culp, supra note 13, at 394.

[35] Other employers would remain at forty hours and absorb the increased cost. Still others would reduce to thirty-two hours and hire additional full time workers. And finally, some would simply reduce to thirty-two hours without hiring additional workers. Id. at 394-96.

[36] Id. at 414.

[37] Currently, about ten million Americans are unemployed. Id. at 397.

This proposal would allow the play of economic forces, including unionism, to determine how employers deal with the consequences of the new requirement, and would honor existing collective bargaining arrangements through their term. Our economy is so varied and complex that detailed regulation is difficult. Effective regulation should set forces in motion which operate without direct government supervision. Therefore, the response to the thirty-two hour work week should be worked out primarily by those involved.

C. *Wage Disparities*

The third indicator of discrimination has been the lower wage levels of minorities and women. Nevertheless, the first decade following the enactment of Title VII was largely devoted to opening job and promotional opportunities for minorities and women, rather than challenging wage rates in jobs to which they had been traditionally assigned. The lower pay rates for traditional minority and female jobs were not initially perceived as discriminatory.

Some work was done on the issue of wage discrimination in the sixties, notably in the Newport News agreement of 1966[38] and the settlement of the Planters Manufacturing case in 1967.[39] However, the unstated assumption during that period was that the opening of promotional opportunities to higher paying jobs was a sufficient prospective remedy for the concentration of minorities and women in low paying jobs. The Equal Pay Act did address the issue of wage equity,[40] but applied only where a job held by a female was similar in content to a higher paying job held by a male. As a result, the Equal Pay Act was of limited utility because most "women's jobs" were and are different from "men's jobs."[41] The strategy of opening promotion opportunities was of limited value because it did not provide relief for depressed wages earned by those at the bottom of the wage-job-pyramid. In addition, many workers, particularly those in their middle years, hesitated to give up work that they were performing satisfactorily for a new, unknown, possibly risky, and possibly discriminatory job situation.

In the mid-seventies, these facts were recognized, and attention began to shift to pay equity for jobs of "comparable worth."[42] In 1979 an ovarian article analyzed the problem as "wage discrimination based on job segregation."[43] A challenge to wage structures, under the theory of wage discrimination, was permitted by the Supreme Court in the *Gunther* decision in 1981.[44] A vast expansion of this area of law will probably take place during the 1980's.[45] Thus, affirmative action in the next period of its development will include pressure to increase wages in jobs held predominantly by minorities or women. This approach may, at last, address the minority and female income disparities. Considerable litigation will inevitably be necessary before a new sense of equity or fairness in the wage structure emerges.

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[38] Black Employment, supra note 3, at 328-407.

[39] International Chem. Workers Union v. Planters Mfg. Co., 54 Lab. Cas. (CCH) ¶ 9025 (N.D. Miss. 1966) (motion to dismiss denied), 55 Lab. Cas. (CCH) ¶ 9046 (N.D. Miss. 1967).

[40] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963).

[41] Blumrosen, Wage Discrimination, Job Segregation, and Title VII of The Civil Rights Act of 1964, 12 U. Mich. J.L. Ref. 397, 399-400 (1979) [hereinafter Wage Discrimination].

[42] See, e.g., Quotas, supra note 11, at 696-98.

[43] Wage Discrimination, supra note 41, at 416 n.84. This article notes that most of the research reported in M. Hughes, The Sexual Barrier: Legal, Medical, Economic and Social Aspects of Sex Discrimination (1977), dealing with sex roles and attitudinal data, was published after 1970.

II

NEW AREAS OF AFFIRMATIVE ACTION

The success of affirmative action programs means that there are now significant numbers of minorities and women in middle income level positions. Therefore, problems of race and sex discrimination are no longer exclusively the problems of the poor. In order to ensure that these minorities and women enjoy the fruits of affirmative action in employment, civil rights supporters need to embrace a range of new issues, including tariffs, tax policy, and quality of life. In taking this approach, the civil rights movement can rebuild alliances with other interests, to the mutual benefit of all.

A. Affirmative Action and Taxation

Because minorities' and women's wages are generally lower than those of white males, specific aspects of tax policy are obvious candidates for examination. Such policies include taxation of low wage earners and the impact of the tax structure on the cost-of borrowing money.

1. Taxation of the "Working Poor"

Taxing the lowest levels of income obviously has an adverse effect on minorities and women because a higher proportion of them are represented in these lower income levels. They are the working poor or low-middle class. Although an important social interest is furthered by encouraging persons in this category to improve their situations rather than depend on public support, the government taxes them when they begin to earn even very little. The "earned income credit"[46] is but a limited effort in recognition of this inequity. The taxation of the working poor, in effect, encourages welfarism and penalizes those who seek to make a better life for themselves. It is time the civil rights community sought tax relief for the working poor to enable them to save or spend more of what they earn.

2. Taxation and the Cost of Borrowing Money

Low- and middle-income persons who seek to borrow in order to improve their condition in life are disadvantaged by tax policies which enable higher-income earners to borrow money more cheaply than lower-income earners. For example, consider the annual cost of borrowing $10,000 at 10% interest, which is $1,000. A taxpayer in the highest tax bracket (50%) would ordinarily pay $500 in tax on that $1,000. If the taxpayer borrows $10,000 and uses that $1,000 to pay interest, the expense is deductible from taxable income. The taxpayer "saves" the $500 she would otherwise pay in taxes on the $1,000. Therefore, the actual cost of borrowing the $10,000 to this taxpayer is not $1,000, but only $500. Someone in the 25% tax bracket has an actual cost of $750 per year for borrowing that same $10,000 because the interest deduction saves only $250. Thus the actual interest cost of borrowing for housing, automobiles, home appliances, not to mention the cost of opening a small business, is higher for low-income persons than for higher-income persons. This makes it more difficult for lower-income persons to take advantage of opportunities to invest. Affirmative action should seek to afford low income persons the same borrowing opportunities that the wealthy receive: low-income persons should also be allowed to deduct 50% of their interest payments. This is a more sensible approach than that of further reducing the taxes of the rich by a "flat rate" tax which unrealistically assumes that "tax loopholes" can be closed.

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[44] County of Washington v. Gunther, 452 U.S. 161 (1981).

[45] See, e.g., AFSCME v. State of Wash., 32 Fair Empl. Prac. Cas. (BNA) 1577 (W.D. Wash. 1983).

[46] 26 U.S.C. § 43 (1982).

The flat rate tax idea will, in fact, penalize the lower-middle class which must use its entire income for either personal consumption or debt charges; thus, such a tax furthers the monopoly of the rich over capital acquisition and accumulation. In addition, if the tax exemption for municipal bonds is eliminated, the cost of borrowing for cities, where minorities are concentrated, would increase. Civil rights interests should vigorously oppose such an approach to taxation.

B. *Tariff Policies and Affirmative Action*

The downward pressure on wages in the United States resulting from competition of low-wage countries should also become a civil rights issue, requiring a new form of affirmative action. Many of the jobs which are leaving the United States are low- and middle-skill jobs which would otherwise be accessible to minority and female workers who have had limited training opportunities. Using the language of EEO law, the flight of these jobs overseas has an "adverse impact" on minority and women workers.

One of the major achievements of EEO law and affirmative action of the 1970's was the Steel Industry Consent Decree of 1974.[47] The decree gave minority and female workers the benefit of their total length of service in competing for improved jobs, and in being protected against layoffs. This was a vast improvement over the "departmental" seniority systems which had locked minority workers into the departments and jobs to which they had been assigned because of their race.[48] By the 1980's, this Consent Decree meant tnat minority workers would be the last laid off as the steel industry closed plant after plant under pressures from foreign competition. To preserve the gains of affirmative action, therefore, the civil rights movement should insist on a tariff policy which demands that low wage countries measurably improve the real wages of their own workers, as a condition of free access to American markets.

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[47] See U.S. v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975).

In response to this analysis, some argue that under free competition consumer prices will be lower, and therefore the economic position of minorities and women is advanced by a "free market" approach to tariffs. This response fails to address a crucial aspect of the EEO law. The law is intended to enhance dignitary as well as economic interests.[49] It is part of a broad civil rights program involving access to public accommodations and the political process, as well as economic concerns such as employment.

Viewing minority and female workers purely as "consumers" disregards the social importance of work as an indicator of individual dignity. The nature of an individual's job influences individual dignity because work defines one's role in society.[50] The value of that role is related to the wages which the work commands. Discrimination which circumscribes opportunity and confines minorities and women to low-paying jobs harms both dignitary and economic interests. The flight of "blue collar" jobs overseas has special impact on minorities who might otherwise hold them. It is unrealistic to expect the very groups who have been discriminated against in the past to bear, in silence, the heavier brunt of the flight of jobs out of the country, and the restrictions of our access to foreign markets under the banner of free competition. To these groups, this result may appear to be a continuation of discrimination against them in yet another form. Therefore, affirmative action for the 1980's should include a tariff policy which encourages low-wage countries to raise the real wages of their workers.

It would be wrong to adopt a merely protectionist attitude toward low-wage countries. Free access to our markets should be conditioned on continuing improvement in the conditions of workers in these low wage countries. The problem is that low wages in these countries leverage *down* the wages of American workers. The advanced position of the American workers should be used to leverage *up* the wages of workers in foreign countries. The harm is magnified in dealing with countries such as Japan, where American-made goods, produced under affirmative action conditions, are denied free access to its markets.

Tariff policy should, therefore, protect both our affirmative action gains against the ravages of low-wage countries and establish a position of leadership for the United States in improving the lot of workers in the rest of the world.

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[48] Black Employment, supra note 3, at 169-217.

[49] Group Interest, supra note 21, at 117-32.

[50] See generally K. Auletta, The Underclass (1982) ("view from the bottom").

C. *Quality of Life: Recognizing the Social Interests of Minorities*

Minorities are heavily concentrated in our major metropolitan cities, where the quality of many services is lower than in the largely white suburban areas. The cities are increasingly dominated by minority political figures, but the economic basis for municipal services has eroded. For black working families, which face crime in the streets and inadequate public school systems for their children, affirmative action and improved job opportunities have not brought corresponding improvement in their life situations. This is because traditional concepts of civil rights and affirmative action have not adequately addressed some fundamental expectations of our society: adequate protection for persons and property, and adequate educational opportunities for children.

1. *Education*

The quality of inner city public schools is notoriously lower than that of suburban schools. The burden of this disparity falls most heavily on inner city children, including the most talented among them. Their potentials may never be recognized. Correcting this requires a program aimed at early identification of the talented members of the minority school population.

Social conditions and family situations may suggest longer school days and a higher degree of security for teachers and students. The demand for such services should become part of the concept of affirmative action. Teachers should not be required to spend the bulk of their time as caretakers of unruly children.

It may be unpleasant to address these realities, in part because many teachers and administrators in inner city public schools are now, by virtue of affirmative action, themselves minorities. Therefore criticism of education programs may sound like a "blame the victim" argument. But that is not the case. The race or sex of a teacher or administrator placed in a difficult or impossible situation by massive currents of social change is not germane to the question of how well we face these challenges. The more serious default would be to fail to address them because of the race or sex of those involved. We do not want observers in 1990 to conclude that we perpetuated the inferior education of minority children by placing in charge of that education persons whose presence made it impolitic to raise questions about its quality.

2. *Security of Persons and Property*

The post-World War II civil rights program did address one facet of the question of personal security; it demanded a strong federal anti-lynching law to protect blacks from white lawlessness.[51] Lynching has ceased, but this aspect of the civil rights program has not been pressed to its logical conclusion: protecting minorities against lawless invasion of their persons and property. The burden of discrimination has made it difficult for minorities to develop personal skills and to acquire and accumulate property. Additionally, minorities suffer disproportionately from criminal injury to person and property, thus compounding difficulties created by discriminatory conditions of life.[52] For a black worker whose home is ransacked, or whose family is mugged or whose children are seduced into drugs, the color of the skin of the criminal must matter little.

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[51] See President's Committee, supra note 1, at 20-25, 157-58.

In the past we have hesitated to demand affirmative action to protect the rights of persons and property in minority communities. Rather, the emphasis has been on another aspect of the post-World War II program, protection of minorities against police brutality.[53] Without diminishing efforts to prevent police brutality, the focus for affirmative action should be on protecting minority citizens against all unlawful acts. This will require enhanced police protection in minority communities. A fear of police brutality may have deterred the demand for this protection. If so, this is simply another case of one form of discrimination immobilizing the fight against another. The fear of police brutality should not result in open season for criminal assaults on minority persons and property.

3. *Drug Abuse*

The problems resulting from drug abuse have not been vigorously addressed by the nation, or by the civil rights community. Because of the heavy incidence of drug abuse in the minority community, the drug problem has a disproportionately adverse impact on minorities, and should be addressed as part of an affirmative action program.[54] For example, the civil rights community should demand the use of the military to curtail illegal importation of drugs. The current resources available to civil authorities to curtail this problem are technologically and quantitatively inadequate.

D. *Antitrust Policy*

Those interests in affirmative action should concern themselves with our antitrust policy. Government policy has allowed large corporations to swallow up smaller companies at an alarming rate as long as they were not in the same industry. It has also allowed the use of capital for acquisition rather than reinvestment in plant and equipment, which in the future may weaken our national competitive position. The probable decline in independently owned and operated business institutions will inevitably have a restrictive effect on opportunities for minorities and women. Minorities and women will find it more difficult to establish or maintain their own businesses in the face of such conglomeration, and may find large corporations less responsive to their individual talents and capacities and less receptive to diversity. Affirmative action works most effectively in an economy which provides maximum diversity among business units.

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[52] Black males had a homicide victim rate of 66.6 per 1,000,000 compared to a rate of 10.9 for white males in 1980. Black females had a rate of 13.5 compared to 3.2 for white females in that year. Statistical Abstract 1984, supra note 10, at 180. See id. at 179 for other comparative victim statistics.

[53] President's Committee, supra note 1, at 25-27, 157.

[54] See statistics cited in N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 584-86 (1979).

E. Bankruptcy

Professor Shuchman has established that nearly 50% of those who invoked the Bankruptcy Act in northern New Jersey in 1980-81 were minorities or women.[55] Yet the civil rights movement did not oppose proposals to make it more difficult for small debtors to secure a bankruptcy discharge. This may not have been perceived as a civil rights issue, but it surely is under the assumptions of this article, and deserves more attention.

CONCLUSION

The discussion presented in this article has taken us far afield of the traditional concerns of the civil rights community. Raising these questions leaves a feeling of discomfort from working in unfamiliar terrain. The professional tendency to specialize makes it more comfortable to follow lines of thinking developed many years ago. We all are familiar with the traditional debate about affirmative action in employment, regardless of which side one advocates.

But we may debate ourselves into irrelevance if we do not recognize that the changes brought about by affirmative action necessitate a broadening of our concerns.[56] We must modify affirmative action to address these new realities while preserving the principle that we must consciously assert our power, influence and ability to build a more just society.

The majority community may support a civil rights approach in the unconventional areas of affirmative action outlined in the article. The values to be advanced are traditional values, and the beneficiaries will include those members of the white society whose life situations are similar to those of many minorities. There may lie, in this expanded view of affirmative action, the seeds of a new coalition of the type which forged the Civil Rights Act of 1964. The concept of affirmative action in civil rights is barely 20 years old. It has the potential to render further service in our continuing quest for a more just society.

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[55] Author's files (available upon request).

[56] Prof. Nathan Glazer has identified the need for a new liberal synthesis. See Glazer, New York Intellectuals — Up From Revolution, N.Y. Times Book Review, Feb. 26, 1984.

Mr. **Martinez**. Thank you, Professor Blumrosen.

Mr. Hayes.

Mr. **Hayes**. Thank you, Mr. Chairman.

This testimony is so excellent, I hope you will mail a copy of it to the head of the Commission, will you?

Mr. **Blumrosen**. I will.

Mr. **Hayes**. That is all I want to say.

Mr. **Martinez**. Thank you, Mr. Hayes.

Mr. Gunderson.

Mr. **Gunderson**. Thank you, Mr. Chairman.

I, too, would compliment you on not only a good presentation, but from a member of the committee's perspective, it is always nice to get a presentation that is also fairly entertaining, and I want to compliment you on that.

I do have a couple of questions, however. But I have told people in the administration, whether it be within the EEOC, within OSHA, within the USDA, wherever or whatever the committee might be, that I am not hung up on process at all.

I agree as you indicated in your remarks, there is no monopoly on wisdom in any administration. There is no patent on a correct process.

I am only concerned about results. Where I would come to the defense of the EEOC is I think that if you look at their results, as they have said, no one can in any way, shape or form suggest they haven't complied with the law, just because there is some rhetoric of the chairman that people don't like and personal views, that even I have indicated I don't agree with him on. I think automatically people are making assumptions that because the process is different, the results are automatically going to be different. I think it is wrong to make this automatic assumption.

You seem to criticize the process for the review of the uniform guidelines. You have suggested that in the past there has been an informal document circulated before preliminary regs are published for comment, et cetera.

I personally don't see anything wrong with there not being an informal document circulated as long as sometime before the final promulgation of rules there is opportunity for public comment. I have indicated while I have no disagreement at all with the American Psychological Association, I don't understand why there is an automatic assumption that they have to be involved in the writing, or any other group for that matter, just make a comment. I mean, is it so bad that an administration that comes in, and let's be blunt about it, comes in with some fairly strong feelings about the way the bureaucracy has worked in the past, make changes to the process. Is that in and of itself automatically a reason for guilt?

Mr. **Blumrosen**. No, it isn't, Mr. Gunderson. The problem in this area—and there are many people in the room who are members of a club who have been associated with the development of these guidelines over some 20 years—the problem here is that we are dealing with an area where the law refers to the profession of psychology. The law refers to professionally developed ability tests.

And we got into this whole area because the EEOC had to address the question what is a professionally developed ability test. So that puts us right—and this is an area that I have been interested in for years as an academic, the relationship between law and other activities, other fields of endeavor.

This field involves the relationship of law and industrial psychology. There isn't any way of avoiding that, and believe me, as I stuck my toe into the waters of industrial psychology, it is very complicated if you take it at any given year, and the industrial psychological profession has been changing its views over time.

So that is why in this particular area you need to have a lot of informal dialog first so that everybody gets the sense of what is now thought of as appropriate and what is now practical.

Now, if you don't get that input first, that is, before you go to the public process, you may have incorporated some erroneous premise that the people get locked into. You know how that works.

Once it is out there, then the reputation of whoever put it out there is on the line and it is hard to back away from. So if what you want is sensible government, the development of a process of a regulation in this field that most of the parties involved—and they are very different parties, they have very different interests on different matters. It is a very complicated thing—that most of them can live with, then it is absolutely essential for this particular regulation that there be this informal process first.

I have written an article about the development of just one section of the uniform guidelines, a section dealing with the bottom line, and how complicated it was to develop that. I would be glad to send you a copy of that. It will give you a sense of what I am talking about.

This is highly complex stuff. The lawyers have got to learn some industrial psychology. The industrial psychologists have got to understand what the law requires and make their contributions as to how that legal requirement can fit, and that is why in this area I think you need informal consultation first.

Mr. GUNDERSON. One final question, can I conclude from your statement that you are not critical of things that have happened thus far, as much as you are concerned about what might happened?

I reviewed your testimony as you were talking, and on page 6, you say, "it appears"; on page 16, you say "it suggests"; on page 12, you say "proposed revision"; on page 19, you say "if the EEOC moves." It seems to me that nothing has happened today. What we are doing today is, we are having a big hearing on the "what ifs"; is that correct?

Mr. BLUMROSEN. Well, not really. I think that—of course, this was written before Chairman Thomas spoke here this morning, and I think it is fair to read that submission that OMB published on August 9 as a serious document emanating from the EEOC describing their present intentions.

It is not something they might do in the future. Those are there present plans, they had dates. They had that February 1986 date to have a revision of the uniform guidelines. That is really what is so troubling is that the document says that by next February they are going to have a Commission vote on this.

Now, from my experience you can't do that unless you are very far along in the process already. And that is what got me worried. I think that is more than "what if." So that is my response.

Mr. GUNDERSON. OK. Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Gunderson.

I would just simply add, that is our concern, too. As we hear in the statements made and attributable to Mr. Thomas in documents that have been published, it is quite clear to us, whether he will admit it or not, that the the Commission does intend to revise those guidelines.

The bothersome problem is that he intends to revise the law, although he sits here and says that he is not going to allow his personal opinion to affect the changing of the law. In promulgating the regulations or guidelines, he is allowing his opinion to creep in, especially when he tries to determine an interpretation of discrimination different than it has been interpreted by the Supreme Court and by the Congress.

Would you care to comment on that?

Mr. BLUMROSEN. Well, I think that is an illustration—what you have just said is a good illustration of the basic concern that I mentioned at the outset of my remarks, that is, up until now, up until the last couple of years. Anyhow, we have all construed title VII broadly as a charter of liberties, to help free people to develop their skills and potentials free of discrimination.

The underlying concern is a shift in that attitude so that it now becomes a technical and narrow statute, and I think that is what fundamentally bothers those of us who are concerned in this field.

Mr. MARTINEZ. Mr. Williams.

Mr. WILLIAMS. Thank you, Mr. Blumrosen. Your testimony really is very helpful, I think, to all of us. It certainly has been to me, although you have created a new and troublesome doubt in my mind about the full appropriateness of the Civil Rights Act of which I have always been a great defender.

One of my greatest fears has been to be stopped by a cop, and at 5 foot 11 asked to step out of the car and find that I am taller, that the offender is taller than the man with the pencil. Sometimes the Civil Rights Act creates problems for all of us, but in the long run, I guess it is good for America, and we are delighted you are here, and appreciate your testimony.

Mr. MARTINEZ. Thank you.

Clarence Thomas asked the question of this subcommittee, because there are no women sitting here that. Could we be charged with discrimination? If a woman had applied and we had denied her, yes, we could be charged with discrimination. They haven't applied.

Thank you very much. It has been very enlightening. We really appreciate it.

Mr. BLUMROSEN. Thank you very much.

Mr. MARTINEZ. I would like to call the first panel, Mr. Robert Patterson, executive director of RBP Associates; Mr. Patrick Patterson, assistant counsel, NAACP-Legal Defense Fund; and Mr. William Robinson, executive director, Lawyers Committee for Civil Rights Under Law.

Why don't we start with Mr. Patterson.

STATEMENTS OF ROBERT PATTERSON, EXECUTIVE DIRECTOR OF RBP ASSOCIATES; PATRICK PATTERSON, ASSISTANT COUNSEL, NAACP-LEGAL DEFENSE FUND; AND WILLIAM ROBINSON, EXECUTIVE DIRECTOR, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. ROBERT PATTERSON. Thank you very much, Chairman Martinez.

Chairman Martinez, and members of the Subcommittee on Equal Opportunities, it is indeed a pleasure to speak with you today about the uniform guidelines and employee selection procedures. To give you a little idea of my background, I have been an EEO specialist and a systems analyst for 15 years working with virtually every Federal agency, many major corporations and State and local governments.

My role has strictly been to assist them in developing results-oriented affirmative action programs and effective EEO efforts. I guess one of the things that I wanted to add after hearing much of the testimony this morning before I begin is the fact that I think the mere suggestion that the uniform guidelines is inappropriate has already had a very major impact.

It certainly has had an impact on my clients. My clients now tell me when I tell them that the uniform guidelines guidelines is something they need to be concerned about, "Why? That guideline is being reviewed, eliminated. Why should we even begin to address these issues?"

I understand, additionally, that in legal proceedings in district court as late as yesterday a Justice Department attorney stated that the guidelines should be given no import in a title VII case because they are under review today on Capitol Hill.

So I think this is an extremely important issue. I think it is important that it be addressed now in a timely fashion and hopefully the concerns about whether or not adverse impact is going to be tested, whether or not we are going to have appropriate validation studies to test selection procedures which have had an adverse impact are, in fact, going to be retained as title VII law, at least as far as how the EEOC interprets it.

My role, as I understand it today, is to assist you in thinking about how the guidelines are actually used with employers, and also perhaps to de-mystify a little bit some of these concepts to get thrown around.

In order to move quickly and give you time to hear the other people who certainly have important testimony for you, I am going to ask you simply to refer to pages 5 and 6 of my testimony where I have a couple of short charts. The chart on page 5 is simply an overview of the uniform selection guidelines' evaluation process. It is really a very straightforward and simple process.

It starts off by gathering data on the numbers of applicants and selectees. The next step is to simply calculate the impact ratios and determine whether or not one group or another has been adversely impacted by the selection decisions made during the previous year.

The question then is, is there adverse impact? If there is, then the next step is to figure out what selection process caused that adverse impact, and then to decide whether or not you are going to eliminate it or modify it.

If you are not, that is when the validation studies are supposed to be produced, to demonstrate the selection procedure, although it had adverse impact, was a valid predictor of successful job performance and, therefore, a business necessity.

Now, the technical aspects of the guidelines are not involving, I think, the adverse impact analysis or the applicant flow analysis, but simply addressing the issues of the validation studies, which studies do you use.

I think the very important role that APA has provided over the years is to suggest what validation studies would be most appropriate since they are the ones who, in fact, certify industrial psychologists or aid in that process and define what are appropriate validation studies and tests.

Now, when we are working with clients, the review of those validation studies are conducted in accordance with the APA standards on testing and the uniform guidelines. Actually, I could use those interchangeably because they are just about identical.

The types of validation studies suggested in the guidelines are exactly the same types of validation studies discussed by APA, and have been, actually, the bedrock of an industrial psychology approach to staffing for many years.

Now, one further step is that if one finds that a procedure which caused adverse impact was valid, and there are other alternative procedures which perhaps would cause less adverse impact, then one is supposed to use the procedures which cause less adverse impacts.

So there is a fairness test in there following that procedure.

Now, in affirmative action program planning, you see this plays a very important role in the barrier analysis process, because what we are trying to find out is although we may have an imbalance, as demonstrated, perhaps, by interrepresentation analysis, why do we have such an imbalance?

There are typically two major reasons. It is either because of the recruitment process, either we are not reaching enough people or because of the selection procedures, somehow we are screening people out in a disproportionate way. So the guidelines help us to make that critical decision. Is it the selection procedures or should we recruit elsewhere?

If, for instance, we eliminate the guideline and the guideline test of adverse impact, that then implies that all problems have to do with recruitment. If we simply recruited further, then there would be no problem, and hopefully find better qualified people.

The problem with that hypothesis is the fact that it has been successfully shown in so many cases that it becomes difficult without an extensive volume. It has been shown that there has been the use of selection procedures which have typically screened out people because of the race, sex, national origin.

That is the crux of the problem. Now, those who say affirmative action is nothing but goals and timetables and then equate that to quotas misunderstand, I think, the fundamental real use of affirmative action programs, and those uses are to eliminate those selection procedure barriers, to creatively come up with new selection procedures that, in fact, accomplish the selection of highly qualified persons regardless of race, sex, national origin, and in fact, recruit at the right places and using the right techniques in order to achieve a fully representative work force.

I think that that is quite a different story. So those affirmative action programs which utilize the uniform guidelines and utilize the concept of underrepresentation accomplish their ends not through the use of fixed quotas, but through the use of more appropriate management actions to create a more effective work force.

That actually is the end result of what we are after. In order to look at what adverse impact actually looks like, on the following page I have a very brief adverse impact analysis, the type that is actually outlined in the guidelines.

All one simply does is, as I said, calculate the number of applicants, the number of selections, calculate the selection rate for each group, those are percentages—for instance, 8 out of 125 white males were selected for a rate of 6.4 percent. Then simply divide the group that had the highest rate into the other rates to come up with the impact ratio.

If that ratio is below 0.8, or using the four-fifths rule of thumb, then there is adverse impact. In this example, two groups had adverse impact. That, then, triggers the next step of the process which is to find out what created the problem.

It doesn't automatically imply that there was discrimination. It simply triggers where to look. Now, what one has to envision in affirmative action planning is the fact that you could look at practically everything, awards, hires, training, separations, reassignments, promotions, downgrades, all of the different employment actions.

What this guideline helps us to do is to focus actually in on the problems, rather than to use a scatter-gun approach to EEO and affirmative action. It points out what created the imbalance specifically, and then when we can fix that, we can solve the problem quickly and cheaply.

From my experience, that is what the guidelines help do. Now, on the other hand, when it comes to complaint processing, the guidelines then tell the EEOC at what point it is appropriate for them to step in.

Without the trigger for affirmative action, without the ability to focus in on a problem, affirmative action, I fear, does become a quota system, and all we look at is whether or not we have the numbers, and we don't look at what created the problem.

Without this trigger, EEOC would have a very difficult time taking a case. How would they possibly determine what is appropriate and what is inappropriate?

So I think from both sides, both uses of the tool, we have to have something like the uniform guidelines, if not, in fact, the uniform guidelines. I guess, in summary, my biggest concern about the uniform guidelines is not necessarily whether or not it needs modification—I suppose one could argue very successfully about whether or not the four-fifths rule of thumb is the appropriate tool to use as a trigger.

I could say 75 percent rule. I could say 85 percent rule, 90 percent rule, 95 percent rule. There are those who said a long time ago, and I was one of them, that under the four-fifths rule of thumb you could still have discrimination because what that means is the minorities are only getting perhaps 80 percent on a constant figure.

Now, that is not very fair. So there are legitimate questions to be looked at.

But we have to have some standard. We have to have some ability to do this. This has been extremely successful in the efforts undertaken by many of the agencies and employers that we have worked with, certainly, and many of the agencies in the Federal bureaucracy have used these guidelines, and FEORPP, the Federal Equal Opportunity Recruitment Program plan, the Garcia amendment to the Civil Service Reform Act, to create very strong, meaningful, well-focused, and targeted affirmative action programs.

I would also suggest that those agencies that have not bothered to do those things have, in fact, laid themselves open to vast charges of unfair treatment and discrimination and are beginning to feel the brunt of that because they are beginning to experience large increases in litigation costs, and they will continue to do so.

When I was with the Navy, prior to going to the EEOC to work on management directives 702 and 707 for the Commission, one of the biggest concerns that we had at that time was the fact that our litigation costs would begin to start showing up as a major piece of the Navy budget, and that was testified to before this subcommittee a number of years ago.

So we had to do something. What we did was a management directive 707-type process. And it worked remarkably well. Then when those of us from Navy who went to the EEOC were asked to work on 707, we used similarities from that process, the uniform guidelines, and a few other tools which had come around by that point to actually do the job.

I hope that in your efforts and in the EEOC's efforts to review this guideline you will take into consideration the fact that we have to have something concrete upon which to target and will focus our efforts in the EEO on affirmative action.

Thank you very much.

[The prepared statement of Robert Patterson follows:]

PREPARED STATEMENT OF ROBERT B. PATTERSON, JR.

CONGRESSMAN MARTINEZ AND MEMBERS OF THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES, IT IS INDEED A PLEASURE TO SPEAK WITH YOU TODAY ABOUT THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES. AS A PRACTICING EEO SPECIALIST AND SYSTEMS ANALYST FOR THE LAST FIFTEEN YEARS, WORKING WITH EVERY FEDERAL AGENCY AND MANY STATE AND LOCAL GOVERNMENTS AND PRIVATE INDUSTRY, IT HAS BEEN MY RESPONSIBILITY TO ASSIST EMPLOYERS IN THE DEVELOPMENT OF DATA BASED RESULTS ORIENTED EEO AND AFFIRMATIVE ACTION PLANS.

SINCE 1978, THE UNIFORM GUIDELINES HAVE BEEN THE CORNER STONE TO BUILDING SUCCESSFUL EEO PROGRAMMING EFFORTS. I WILL ADDRESS TODAY USE OF THE GUIDELINES AS A TOOL FOR CONDUCTING A SYSTEMATIC ANALYSIS FOR IDENTIFYING BARRIERS AND IMPEDIMENTS TO THE ACHIEVEMENT OF EEO IN AN ORGANIZATION.

THE GUIDELINES PROVIDE THE FOLLOWING INTERPRETATION OF ILLEGAL DISCRIMINATION UNDER TITLE VII:

> THE USE OF ANY SELECTION PROCEDURE WHICH HAS AN ADVERSE IMPACT ON THE HIRING, PROMOTION, OR OTHER EMPLOYMENT OR MEMBERSHIP OPPORTUNITIES OF MEMBERS OF ANY RACE, SEX, OR ETHNIC GROUP WILL BE CONSIDERED TO BE DISCRIMINATION AND INCONSISTENT WITH THESE GUIDELINES, UNLESS THE PROCEDURE HAS BEEN VALIDATED IN ACCORDANCE WITH THESE GUIDELINES OR THE PROVISION OF SECTION 6 ARE SATISFIED WHICH ALLOWS THE USE OF ALTERNATIVE SELECTION PROCEDURES IN ORDER TO ELIMINATE ADVERSE IMPACT OR AS PART OF AN AFFIRMATIVE ACTION PROGRAM.

THE GUIDELINES DEFINE "ADVERSE IMPACT" AS A SUBSTANTIALLY DIFFERENT RATE OF SELECTION IN HIRING, PROMOTION OR OTHER EMPLOYMENT DECISION WHICH WORKS TO THE DISADVANTAGE OF A RACE, SEX, OR ETHNIC GROUP. "VALIDATED IN ACCORDANCE WITH THESE GUIDELINES" MEANS A DEMONSTRATION THAT ONE OR MORE VALIDITY STUDY OR STUDIES MEETING THE STANDARDS OF THESE GUIDELINES HAS BEEN CONDUCTED, INCLUDING INVESTIGATION AND WHERE APPROPRIATE, USE OF SUITABLE ALTERNATIVE SELECTION PROCEDURES..., AND HAS PRODUCED EVIDENCE OF VALIDITY SUFFICIENT TO WARRANT USE OF THE PROCEDURE FOR THE INTENDED PURPOSE UNDER THE STANDARDS OF THESE

GUIDELINES.

EMPLOYERS ARE REQUIRED TO CONDUCT ADVERSE IMPACT STUDIES ANNUALLY USING THE "FOUR-FIFTHS RULE OF THUMB", A TECHNIQUE WHICH DEMONSTRATES WHETHER OR NOT ONE OR MORE CLASS GROUPS ARE REPRESENTED IN SELECTION AT LESS THAT AN 80% RATE WHEN COMPARED WITH THE CLASS GROUP WITH THE HIGHEST SELECTION RATE. IF ADVERSE IMPACT IS FOUND, THEN EMPLOYERS MUST CONDUCT AN APPLICANT FLOW ANALYSIS TO IDENTITY THE SELECTION PROCEDURE(S) WHICH CREATED THE ADVERSE IMPACT. ONCE THE PROCEDURE(S) IS FOUND WHICH CAUSED THE ADVERSE IMPACT, THEN THE EMPLOYER MAY:

O ELIMINATE THE SELECTION PROCEDURE,

O MODIFY THE PROCEDURE AND RETEST FOR ADVERSE IMPACT, OR

O DEMONSTRATE THAT EVEN THOUGH THE PROCEDURE CREATED ADVERSE IMPACT IT WAS A VALID PREDICTOR OF SATISFACTORY JOB PERFORMANCE AND THEREFORE, WILL BE MAINTAINED AS A BUSINESS NECESSITY (THE GUIDELINES STATE ADDITIONALLY THAT IF OTHER PROCEDURES EXIST WHICH ARE VALID YET CAUSE LESS ADVERSE IMPACT, THEN THE EMPLOYER SHOULD ELIMINATE OR MODIFY THE

PROCEDURE TO REFLECT THAT WHICH REDUCES ADVERSE IMPACT).

I HAVE INCLUDED AS FIGURE 1 A FLOW CHART OF THE ENTIRE GUIDELINES EVALUATION PROCESS. IN THE DEVELOPMENT OF AFFIRMATIVE ACTION PLANS, ADVERSE IMPACT STUDIES ARE PART OF THE REQUIRED REASONABLE SELF-ANALYSIS AND PROVIDE EMPLOYERS WITH A REASONABLE BASIS (29 CFR 1608) FOR AFFIRMATIVE ACTION.

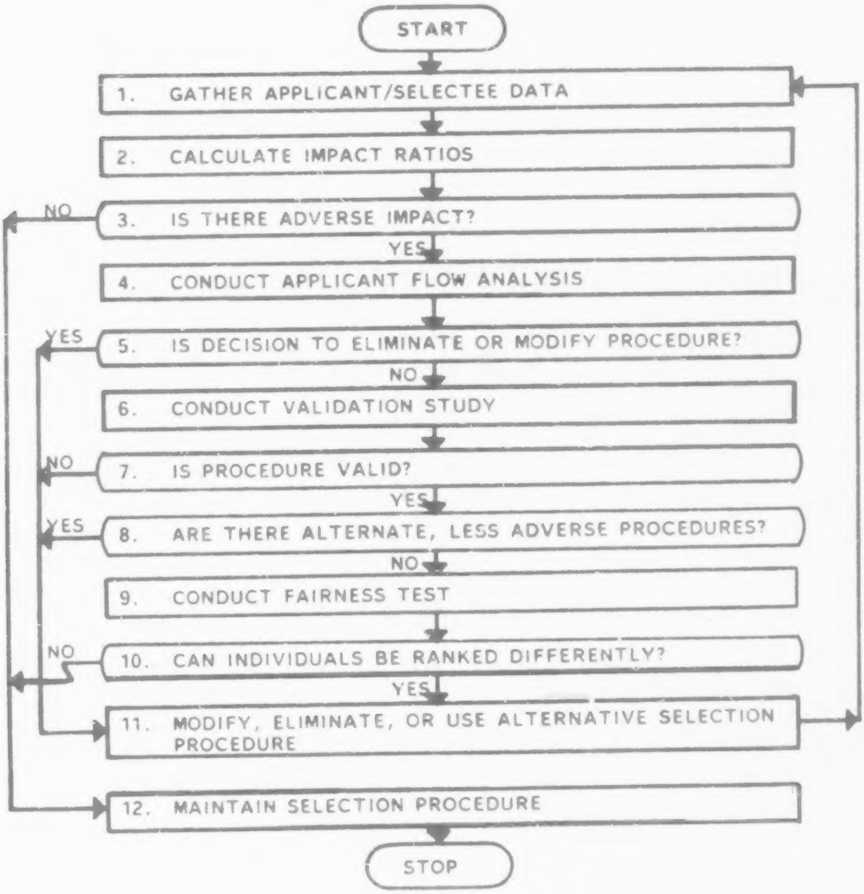
FIGURE 2 PROVIDES AN EXAMPLE OF AN ANNUAL ADVERSE IMPACT STUDY CONDUCTED FOR AN EMPLOYMENT CATEGORY WITHIN A FEDERAL AGENCY.

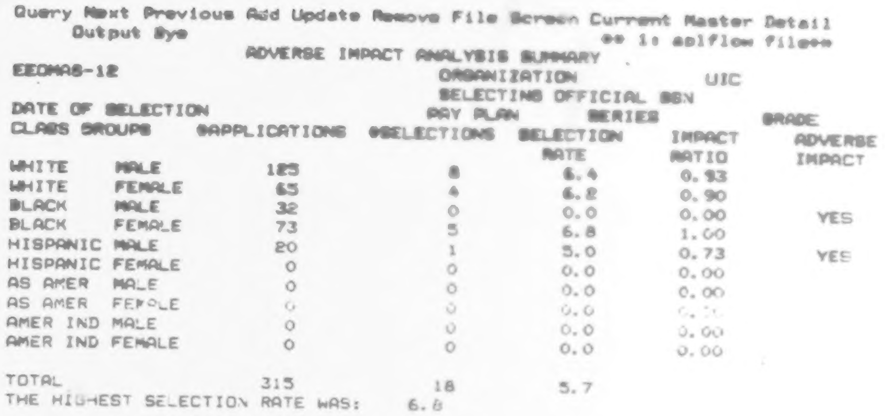
AS YOU CAN SEE TWO EEO CLASS GROUPS EXPERIENCED ADVERSE IMPACT. THE NEXT STEP WOULD BE TO DETERMINE WHICH SELECTION PROCEDURE CAUSED THE OBSERVED DISPARITY. WAS IT THE INITIAL SCREENING FOR QUALIFICATION, THE RATING AND RANKING PROCEDURE, SOME PAPER AND PENCIL TEST, INTERVIEW PROCEDURE OR THE FINAL DECISION MADE BY THE SELECTING OFFICIAL. ONCE THE STEP IS IDENTIFIED MANAGEMENT WOULD THEN DECIDE TO ELIMINATE, MODIFY, OR MAINTAIN (WITH A VALIDATION STUDY) THE USE OF THE QUESTIONED PROCEDURE. THESE ACTIONS TAKEN BY MANAGEMENT ON A TIMELY BASIS CONSTITUTE PART OF THEIR AFFIRMATIVE ACTIONS TO ELIMINATE BARRIERS AND IMPEDIMENTS TO ACHIEVEMENT OF FULL EEO. WHEN THE UNIFORM GUIDELINES ARE APPLIED ALONG WITH APPROPRIATE ANALYSIS OF RECRUITMENT SOURCES AND TECHNIQUES, MANAGERS CAN MAKE REASONED AND WELL TARGETTED DECISIONS POSITIVELY IMPACTING ON THE ACHIEVEMENT OF EEO. I HOPE THAT THIS DISCUSSION HELPS TO CLARIFY THE INTENDED USE AND STRUCTURE OF THE GUIDELINES. THANK YOU VERY MUCH.

ROBERT B. PATTERSON, JR

FIGURE 1

SELECTION PROCEDURE EVALUATION PROCESS


START
1. GATHER APPLICANT/SELECTEE DATA
2. CALCULATE IMPACT RATIOS
NO
3. IS THERE ADVERSE IMPACT?
YES
4. CONDUCT APPLICANT FLOW ANALYSIS
YES
5. IS DECISION TO ELIMINATE OR MODIFY PROCEDURE?
NO
6. CONDUCT VALIDATION STUDY
NO
7. IS PROCEDURE VALID?
YES
YES
8. ARE THERE ALTERNATE, LESS ADVERSE PROCEDURES?
NO
9. CONDUCT FAIRNESS TEST
NO
10. CAN INDIVIDUALS BE RANKED DIFFERENTLY?
YES
11. MODIFY, ELIMINATE, OR USE ALTERNATIVE SELECTION PROCEDURE
12. MAINTAIN SELECTION PROCEDURE
STOP



```
Query Next Previous Add Update Remove File Screen Current Master Detail
     Output Bye                                          ** 1: aplflow file**
                         ADVERSE IMPACT ANALYSIS SUMMARY
EEOMAS-12
                                        ORGANIZATION            UIC
                                        SELECTING OFFICIAL SSN
DATE OF SELECTION                      PAY PLAN       SERIES              GRADE
CLASS GROUPS       #APPLICATIONS   #SELECTIONS   SELECTION     IMPACT      ADVERSE
                                                    RATE        RATIO       IMPACT
WHITE     MALE          125             8            6.4         0.93
WHITE     FEMALE         65             4            6.2         0.90
BLACK     MALE           32             0            0.0         0.00         YES
BLACK     FEMALE         73             5            6.8         1.00
HISPANIC  MALE           20             1            5.0         0.73         YES
HISPANIC  FEMALE          0             0            0.0         0.00
AS AMER   MALE            0             0            0.0         0.00
AS AMER   FEMALE          0             0            0.0         0.00
AMER IND  MALE            0             0            0.0         0.00
AMER IND  FEMALE          0             0            0.0         0.00

TOTAL                   315            18            5.7
THE HIGHEST SELECTION RATE WAS:      6.8
```

FIGURE 2

Mr. MARTINEZ. Thank you, Mr. Patterson. And then we will turn to Mr. Patterson.

Mr. PATRICK PATTERSON. Thank you.

Mr. Chairman, members of the committee, thank you for the invitation to testify today. As the second Mr. Patterson on the panel, I will try to follow up the first Mr. Patterson's remarks with my own perspective.

I am on the faculty of the UCLA School of Law where I teach courses on a number of subjects, including employment discrimination. Prior to joining the UCLA faculty, I was assistant counsel at the NAACP-Legal Defense Fund for a number of years where I specialized in employment discrimination litigation.

I appear before you today on behalf of the Legal Defense Fund which, as I am sure you know, is a civil rights organization—civil rights legal organization of very long standing, it has been the forefront of civil rights litigation in this country for over 40 years and it has litigated many of the most significant cases in the area of employment discrimination and under title VII of the Civil Rights Act in the Supreme Court and in many of the other courts of the country.

I want to apologize to the members of the committee for not having my written statement available to you today. Unfortunately, it is stuck in a computer. Despite the efforts of a number of technical experts over the last 2 days, we have not been able to get it out.

I would like to ask the committee's permission to submit that testimony within a few days. I am sure we will be able to extricate it by then.

Mr. MARTINEZ. If there is no objection, we will leave the record open.

Mr. GUNDERSON. I wish him luck.

Mr. PATRICK PATTERSON. Thank you very much.

I would like to focus my remarks on statements that have been made by Chairman Thomas and proposals concerning the revision of the uniform guidelines, which I know you have already heard much about. I certainly do not intend, do not mean to engage in any kind of personal attack on Chairman Thomas.

I am simply trying to bring to light the published statements that have been made about this important subject and particularly in the OMB regulatory program document that has already been referred to today.

The difficulty that many of us have in the civil rights community with these statements is not that there is a review of the uniform guidelines going on. Review of regulations that have been adopted in the past is perfectly appropriate, as Mr. Gunderson has already mentioned. That is not our concern.

The concern we have is the way it is being done and the statements that are being made by Chairman Thomas about it. And I would just like to refer you to some specific language in that OMB regulatory program that I think Chairman Hawkins has already mentioned, but I think it is worth reiterating, and this is a quotation from the document itself, the statement of Chairman Thomas of the EEOC:

> I will propose to the Commission and to the co-signatory agencies a revision of the Uniform Guidelines that will recognize that statistical disparities are not tantamount to discrimination and that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards.

In the context of the other statements we have already heard from that publication, I think it is very clear that even though there is an ongoing review of the guidelines, Chairman Thomas has already reached his conclusions about that, what review will show.

Now, there are three points I would like to make briefly about the interpretation of title VII that is contained in those guidelines—in the guidelines as they exist today, those guidelines are consistent with the language and the purpose of title VII and that is as understood and applied repeatedly by the Supreme Court in cases that members of the committee have mentioned, that were specifically ratified by Congress in 1972 in amending title VII and in enacting the Equal Employment Opportunity Act of 1972. The committee reports, including the report from this committee, make it very clear that Congress ratified their interpretation of title VII.

This is also consistent, the second point I would like to make, with the uniform interpretation of title VII in guidelines by five different Federal agencies spanning some 20 years, and many times guidelines have been issued adopting this interpretation of title VII. As Professor Blumrosen pointed out, those guidelines have been adopted under four administrations—two Democratic and two Republican.

My third point: Title VII and the interpretation of title VII reflected in the uniform guidelines are crucially important to securing equal employment opportunity in this country, and they work. I want to emphasize that.

There is overwhelming evidence that blacks and other minorities on the average do not do as well on certain kinds of standardized tests and other similar criteria often used by employers in parceling out jobs.

Now, the uniform guidelines do not prescribe any preferential treatment—I heard that word used earlier today—to deal with this problem. They do not operate on a premise of any kind of inferiority. What they do is try to deal with what is a basic social fact of life in America today. Due to a complex of historical, educational, cultural factors, the most prominent of which is historical discrimination and even slavery—due to all those factors, there are differences in the way people perform on various kinds of measures that are used today to distribute jobs. That has been confirmed many times by many studies, including recently a 1982 study issued by the National Academy of Sciences.

So the question is: What are we going to do about this? How do we correct this problem? What do we do to deal with it?

Apparently, from his published statements, Chairman Thomas advocates ignoring the problem. That is a prescription for the further development of two societies—one black and one white, one minority and one nonminority, separate and unequal.

Title VII and the uniform guidelines, on the other hand, take a different approach. They require doing something about it—requiring a close investigation of tests and other requirements and criteria that have an adverse impact, and allowing the use of such tests only if they actually have something to do with ability to perform a job. That's what title VII and the uniform guidelines are all about. This approach works.

The uniform guidelines, as Mr. Patterson has discussed—the other Mr. Patterson—the uniform guidelines give employers guidance about what to do with these problems. It's also gives them an incentive to do something about these problems.

Then there's a recent empirical study that the members of the committee may be aware of, by Dr. Jonathan Leonard of the University of California at Berkeley, which confirms that title VII works. He has analyzed a great massive data and has concluded that affirmative action has had a significant impact in improving the integration of blacks into the American work force. But he has also looked at title VII litigation, which is separate from affirmative action efforts such as those we are aware of under Executive Order 11246.

His study shows that title VII, perhaps even more than those affirmative action efforts, litigation under title VII has had positive effects. The reason that it has had those effects is because of the Griggs interpretation of title VII that appears in the guidelines.

Now, in terms of the process of revision, I just want to make a couple of brief remarks. Professor Blumrosen has very well outlined the way in which the present uniform guidelines were developed. It was a model of government in the sunshine, it left a long paper trail, which is available—should be available within the EEOC. If it's not available there, it certainly should be available in the Department of Justice, the Department of Labor, the Department of the Treasury, and the Office of Personnel Management, which also participated in the development of those guidelines.

Beyond that, there were published Notices of Rulemaking, there were public hearings. There was a great deal of public participation by individuals and organizations, as you have already heard.

In short, there was adequate opportunity for everybody to participate and full participation.

Now, the current process, by contrast, looks a lot like government in the shadows. In November 1984, representatives of the Legal Defense Fund and the Lawyers Committee for Civil Rights Under Law met with Chairman Thomas. They expressed their concern about what they had heard about revisions of the uniform guidelines. They offered to share with Chairman Thomas and the Commission documents they had developed in the process of their earlier participation and development of the uniform guidelines. That invitation was not accepted.

Moreover, in May of this year, the Legal Defense Fund made a request under the Freedom of Information Act for material that is part of the present process of reviewing the uniform guidelines. That request was granted only to the extent of providing the Legal Defense Fund with four cover letters referring to submissions from the EEOC to the Office of Management and Budget. Those submissions totaled 111 pages, but those 111 pages were withheld, and no information was given as to the content of those 111 pages of documents.

That denial occurred in July 1985 and to date, none of that material has been provided pursuant to the request. Therefore, it seems clear that revisions that are being considered today are being concocted in secret, as far as we can tell. They are not being shared with the public. They are not being shared with some of the individuals and organizations that have the greatest interest and the greatest expertise in this field.

In conclusion, I would just like to make sure the committee is aware of both the secretive process by which review is going on and also that the statements that are made by the Chairman of the EEOC are extremely disturbing to people in the civil rights community in this country. Now, they are contrary to the intent of Congress. They are contrary to the consistent administrative agency and interpretation of title VII through four administrations.

We believe it is entirely improper for the chairman of an agency such as this to make these statements. We just want to request that there be a commitment. To some extent, I think you have received a commitment to share some information with the committee, but we also would like a commitment for the EEOC to share information with those organizations and individuals who have a great interest in this area and in the revision of these guidelines, and the commitment to an open process and any changes in the guidelines.

Thank you.

[The prepared statement of Patrick Patterson follows:]

PREPARED STATEMENT OF PATRICK D. PATTERSON, ON BEHALF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Appendices

Appendix A: Office of Management and Budget, Regulatory Program of the United States Government (Aug. 8, 1985) (statement of Clarence Thomas)

Appendix B: EEOC "Policy Statement on Remedies and Relief for Individual Victims of Discrimination" (Feb. 5, 1985)

Appendix C: Comments of the NAACP Legal Defense and Educational Fund, Inc., Pursuant to the Request for Comments Published by the Equal Employment Opportunity Commission, 48 F.R. 34766 (Aug. 1, 1983), Regarding the Documentation Section of the Uniform Guidelines on Employee Selection Procedures

Appendix D: Freedom of Information Act Request: Letter from Barry L. Goldstein to Stuart Frisch (May 17, 1985)

Appendix E: Freedom of Information Act Response: Letter from Stuart Frisch to Barry L. Goldstein (July 2, 1985)

Appendix F: Letter from Douglas Jackson and Michael S. Fallal to Clarence Thomas re: APA Standards for Educational and Psychological Tests (April 19, 1985)

BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR
October 2, 1985

STATEMENT OF PATRICK O. PATTERSON ON BEHALF OF
THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
ON EQUAL EMPLOYMENT OPPORTUNITY POLICY AND LAW

I. INTRODUCTION

Mr. Chairman and Members of the Committee:

Thank you for the invitation to testify on the important questions that have been raised by recent statements and proposals made by members of the Equal Employment Opportunity Commission. My name is Patrick O. Patterson. I am an Acting Professor of Law at the University of California at Los Angeles, where I teach courses in a number of subjects, including employment discrimination law. Prior to my appointment to the UCLA faculty, I was employed as Assistant Counsel to the NAACP Legal Defense and Educational Fund, Inc. ("Legal Defense Fund" or "LDF"), where I specialized in employment discrimination cases.

I appear before you today on behalf of the Legal Defense Fund, which has substantial experience with the issues on which you have requested our testimony. The Legal Defense Fund has long been in the forefront of this nation's effort to translate its constitutional ideals into realities for black Americans. The Supreme Court has recognized LDF's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." NAACP v.

Button, 371 U.S. 415, 422 (1963). For over forty years, LDF has worked through the courts to establish and enforce the rights of black citizens seeking an equal opportunity to achieve decent housing, quality education, good jobs, and full participation in the mainstream of American life. LDF staff lawyers and cooperating attorneys have been counsel in many landmark cases in the Supreme Court of the United States establishing basic constitutional and statutory rights for black Americans;[1] and they have litigated hundreds of employment discrimination cases throughout the country, including many of the most significant cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964.[2]

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[1] See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 438 (1954); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[2] See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 549 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Brown v. General Services Administration*, 425 U.S. 280 (1976); *International Union of Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *United States v. Aikens*, 460 U.S. 711 (1983); *Firefighters Local Union No. 1784 v. Stotts*, 81 L. Ed. 2d 483 (1984); *Cooper v. Federal Reserve Bank*, 81 L. Ed. 2d 718 (1984); *Webb v. Dyer County Board of Education*, 85 L. Ed. 2d 233 (1985); *Anderson v. City of Bessemer City*, 84 L. Ed. 2d 518 (1985).

My testimony today supplements the testimony given before this Committee by Barry Goldstein on behalf of the Legal Defense Fund on December 14, 1984. On that occasion Mr. Goldstein, in both his oral testimony and his written statement, surveyed a series of recent pronouncements in which EEOC Chairman Clarence Thomas had challenged the application of fundamental legal principles that were established long ago and have been confirmed repeatedly by Congress and the Supreme Court; had disputed the use of statistics as evidence of discrimination; had criticized the Uniform Guidelines on Employee Selection Procedures; and had retracted his support for the use of goals and timetables and other numerical remedies.[3] Rather than repeating this earlier testimony, I will concentrate on two subsequent pronouncements that have brought some of these issues into sharper focus: (1) the issuance by the Office of Management and Budget on August 8, 1985, of a publication entitled The Regulatory Program of the United States Government, which includes a proposal by Chairman Thomas to revise the Uniform Guidelines by reducing or eliminating the use of statistical evidence, the maintenance of necessary employment records, and the standards for demonstrating the validity of employee selection procedures (Appendix A);

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[3] See Statement of Barry Goldstein, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc., Regarding Equal Employment Opportunity Policy, before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor (Dec. 14, 1984).

and (2) the adoption by the EEOC on February 5, 1985, of its "Policy Statement on Remedies and Relief for Individual Victims of Discrimination" (Appendix B).

II. PROPOSALS TO REVISE THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

A. The Existing Uniform Guidelines Are Consistent with Fundamental Legal Principles Enacted by Congress and Confirmed by the Supreme Court.

The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607, were adopted by the EEOC and four other civil rights enforcement agencies in 1978. They generally provide that, if an employment test or other selection procedure has an adverse impact on a race, sex, or ethnic group, an employer should either eliminate the impact or demonstrate the validity of the procedure. An employer who chooses to demonstrate validity normally is required to undertake a reasonable investigation of alternative procedures and uses with less adverse impact, and also to provide validity studies that conform to the technical standards set forth in the guidelines. These guidelines are fully consistent with the language of Title VII of the Civil Rights Act of 1964, the intent of Congress, and the controlling decisions of the Supreme Court.

In enacting §703 of Title VII, Congress prohibited intentional discrimination in employment, 42 U.S.C. §2000e-2(a)(1), and it also made it unlawful for an employer

> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(2).

Congress provided an exception in §703(h) for certain employment testing practices:

> "Notwithstanding any other provision of this [title], it shall not be an unlawful employment practice for an employer...to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin...." 42 U.S.C. §2000e-2(h).

Thus, the language of Title VII prohibits not only intentionally discriminatory practices but also practices--such as some employment tests--that have the effect of "depriv[ing] or tend[ing] to deprive" persons of employment opportunities on the basis of race, sex, or national origin. The use of such a test, even though it is not intentionally discriminatory, violates Title VII unless it is "professionally developed."

In 1966, acting on the recommendation of a panel of professional psychologists, the EEOC adopted the first set of administrative guidelines interpreting the testing provisions of Title VII. The 1966 guidelines, reflecting the language of the statute, read §703(h) as providing an exception only for job related tests; any test that tended to exclude minorities would be considered unlawful unless the employer could demonstrate that the test "fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or...fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs...."[4] In determining whether tests were "professionally developed" within the meaning of §703(h), the 1966 EEOC guidelines referred to the *Standards for Educational and Psychological Tests and Manuals*, which had been adopted jointly in 1966 by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education ("APA Standards").[5] In 1968 and 1969, respectively, the Department of Labor's Office of Federal Contract Compliance[6] and the Civil Service Commission[7] issued their own testing guidelines.

In 1970, the EEOC issued the first detailed set of testing guidelines.[8] The 1970 EEOC guidelines expressly defined "discrimination" in terms of unjustified adverse impact on protected classes, and they relied on the professional standards established by the American Psychological Association and other organizations in setting forth some specific technical requirements for test validation. Additional guidelines were adopted by the Office of Federal Contract Compliance in 1971[9] and by the Civil Service Commission in 1972.[10]

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[4] EEOC Guidelines on Employment Testing Procedures, Aug. 24, 1966, reprinted in 2 CCH Empl. Prac. Guide para. 16,904 (1967).

[5] The APA Standards have since been revised and reissued in 1974 and again in 1985.

[6] See 33 Fed. Reg. 14392 (1968).

[7] See FPM Supp. 335.1 (1969).

[8] EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (1970).

[9] OFCC Guidelines on Employee Testing and Other Selection Procedures, 36 Fed. Reg. 19307 (1971).

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court unanimously held that the 1966 EEOC guidelines were "entitled to great deference" by the courts: "Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the Guidelines as expressing the will of Congress." 401 U.S. at 434. The Court noted that the EEOC interpretation of Title VII had been elaborated in the 1970 guidelines, id. at n.9, and it resoundingly endorsed that interpretation:

> "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has--to resort again to the fable--provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id. at 431.

The employer in Griggs had required applicants for its better jobs to have a high school diploma and to register satisfactory scores on two standardized aptitude tests (the Wonderlic Personnel Test and the Bennett Mechanical Aptitude Test). Although the employer had not adopted these requirements for the purpose of discriminating, both requirements had the effect of "render[ing] ineligible a markedly disproportionate number of Negroes....," 401 U.S. at 429, and neither requirement was "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." Id. at 431. Indeed, the record showed that the requirements had been adopted "without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force." Id. This, the Supreme Court held, was insufficient justification under Title VII for a practice with a substantial adverse impact on minority applicants and employees:

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[10] CSC Guidelines on Examining, Testing, Standards, and Employment Practices, 37 Fed. Reg. 12984 (1972).

> "The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common-sense proposition that they are not to become the masters of reality." Id. at 433.

Echoing the fundamental principles underlying the 1966 and 1970 EEOC guidelines, the Court in Griggs repeatedly emphasized that Title VII, in seeking "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," 401 U.S. at 429-30, was not limited to a prohibition of intentional discriminaton:

> "...[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability....

> "...Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Id. at 432.

Not long after the Supreme Court decided Griggs, Congress enacted the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, which amended Title VII and extended its coverage to federal, state, and local government employment. As evidenced by the reports of this Committee and its counterpart in the Senate, Congress expressly recognized and approved the interpretation of Title VII set forth in the 1966 and 1970 EEOC guidelines and in the Court's opinion in Griggs. This Committee's report stated in part:

> "Employment discrimination, as we know today, is a far more complex and pervasive phenomenon [than previously believed]. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements....A recent striking example was provided by the U.S. Supreme Court in its decision in Griggs v. Duke Power Co...., where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 8 (1971) (footnote and citations omitted).

The Senate Committee's report included similar language, see S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971), and additionally observed that

> "...Civil Service selection and promotion techniques and requirements are replete with artificial requirements that

> place a premium on 'paper' credentials. Similar requirements in the private sectors of business have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (see e.g. Griggs v. Duke Power Co....). The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a heavy burden in trying to meet such artificial qualifications.
>
> "It is in these and other areas where discrimination is institutional, rather than merely a matter of bad faith, that corrective measures appear to be urgently required. For example, the Committee expects the Civil Service Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the Griggs case are fully met." Id. at 14-15.

It is difficult to conceive of a more explicit congressional endorsement of the fundamental legal principles underlying Griggs and the 1966 and 1970 EEOC guidelines. The Supreme Court reaffirmed these principles and specifically approved several provisions of the 1970 EEOC guidelines in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). As the Court stated in Albemarle:

> "The message of these Guidelines is the same as that of the Griggs case--that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" 422 U.S. at 431 (quoting 1970 EEOC guidelines, 29 C.F.R. §1607.4(c)).

These principles have subsequently been reaffirmed and applied in many decisions of the Supreme Court and in countless decisions of other courts.[11]

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[11] See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982).

As noted above, by 1972 the EEOC, the Civil Service Commission, and the Department of Labor each had its own separate set of employment testing guidelines. Thus, even before the enactment of the 1972 amendments to Title VII, the existence of potentially conflicting guidelines was a matter of concern to enforcement agencies, employers, unions, civil rights groups, and others. In response to this and similar concerns, in 1972 Congress established the Equal Employment Opportunity Coordinating Council and charged it with responsibility for developing and implementing uniform enforcement policies. See 42 U.S.C. §2000e-14. The agencies thereafter intensified their efforts to develop a single set of uniform guidelines on employee selection procedures, but for a substantial period of time they were unable to accomplish this goal. In 1976, after several years of unsuccessful efforts, three of these agencies--the Department of Justice, the Department of Labor, and the Civil Service Commission--reached agreement and issued the Federal Executive Agency Guidelines on Employee Selection Procedures ("FEA guidelines").[12] The EEOC, disagreeing with some provisions of the FEA guidelines, then reissued its 1970 guidelines.[13]

It is important to note that, despite substantial discord among the agencies during this period, there was complete agreement as to the correctness and applicability of the basic principles enunciated by all the agencies in their previous guidelines, approved by the Supreme Court in Griggs and Albemarle, and reaffirmed by Congress in the Equal Employment Opportunity Act of 1972. The agencies agreed that Title VII prohibits selection procedures that have an adverse impact unless those procedures are shown to be job related; they agreed that statistical evidence should be maintained by employers and should be used to determine adverse impact; and they agreed that job relatedness should be shown by professionally acceptable methods. The disagreements among the agencies did not concern these fundamental principles, but centered instead on the details of their implementation--i.e., the types of statistical analyses that should be used in assessing adverse impact, and the technical details of the validity studies necessary to demonstrate job relatedness.[14]

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[12] 41 Fed. Reg. 51737 (1976).

[13] 41 Fed. Reg. 51984 (1976).

More than a year later, after further debate and negotiation, all the agencies finally reached agreement and jointly published a proposed draft of the Uniform Guidelines on Employee Selection Procedures on December 30, 1977.[15] The agencies also published a notice of proposed rulemaking, solicited written comments, and held a public hearing and meeting at which testimony was given by representatives of private industry, state and local governments, labor organizations, civil rights groups, and professional psychologists.[16] After considering the written comments submitted by more than 200 organizations and individuals, the testimony elicited at the public hearing and meeting, and the views expressed in informal consultations,[17] the EEOC, the Civil Service Commission (now the Office of Personnel Management), and the Departments of Justice, Labor, and the Treasury revised the proposed draft and adopted the Uniform Guidelines, which have remained in effect since September 25, 1978.[18] The Uniform Guidelines, like their predecessors, reflect the fundamental principles of Title VII law that have repeatedly been reaffirmed by Congress and the Supreme Court.

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[14] See Booth & Mackay, Legal Constraints on Employment Testing and Evolving Trends in the Law, 29 Emory L.J. 121, 124-40 (1980); Note, The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies, 28 Cath. U. L. Rev. 605, 607-10 (1979).

[15] 42 Fed. Reg. 65542 (1977). Before publishing this proposed draft, the enforcement agencies circulated an earlier draft and obtained comments from representatives of state and local governments, psychologists, private employers, and civil rights groups. See Uniform Guidelines, Supplementary Information: Analysis of Comments, 43 Fed. Reg. 38292 (1978).

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[16] See Notice of Proposed Rulemaking, 42 Fed. Reg. 65542 (1977); Notice of Issues of Particular Interest for Public Hearing and Meeting, 43 Fed. Reg. 11812 (1978); Uniform Guidelines, Supplementary Information: Analysis of Comments, 43 Fed. Reg. 38292-93 (1978).

[17] See Uniform Guidelines, Supplementary Information: Analysis of Comments, 43 Fed. Reg. 38292-93 (1978).

[18] See 43 Fed. Reg. 38312 (1978) (EEOC); 43 Fed. Reg. 38310 (1978) (Civil Service Commission [Office of Personnel Management]); 43 Fed. Reg. 38311 (Department of Justice); 43 Fed. Reg. 38314 (1978) (Department of Labor); 43 Fed. Reg. 38309 (1978) (Department of the Treasury). The Uniform Guidelines are codified in 29 C.F.R. §1607 (EEOC); 5 C.F.R. §300.103(c) (Civil Service Commission [Office of Personnel Management]); 28 C.F.R. §50.14 (Department of Justice); 41 C.F.R. §60-3 (Department of Labor).

B. Current Proposals To Revise the Uniform Guidelines Are Being Developed and Considered Without Adequate Public Notice and a Fair Opportunity To Be Heard.

1. The 1983 Request for Comments on Recordkeeping Provisions

Section 15 of the Uniform Guidelines describes the records that employers should maintain concerning adverse impact and, where appropriate, the validity of selection procedures. See 29 C.F.R. §1607.15. On August 1, 1983, the EEOC published a request for comments on the recordkeeping provisions relating to adverse impact. See 48 Fed. Reg. 34766 (1983). The request included seven specific questions regarding those provisions. Question 1, for example, stated:

> "Should the Uniform Guidelines define more specifically the information that a user of a selection process must maintain to show whether its selection procedures have an adverse impact on the basis of race, sex, or ethnic origin? If so, what information (such as applications, applicant flow data, pass/fail data) should the Guidelines require?" Id.

The Legal Defense Fund and other organizations and individuals filed extensive written comments in response to this request, including detailed answers to the questions posed by the EEOC.[19] The EEOC has not, to our knowledge, completed its consideration of these comments. We are not aware of any pending proposals by the EEOC to revise the recordkeeping provisions of the guidelines. No public notice of rulemaking has been issued, no further written comments have been requested, and no public hearings or meetings have been scheduled on this matter.

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[19] See Comments of the NAACP Legal Defense and Educational Fund, Inc., Pursuant to the Request for Comments Published by the Equal Employment Opportuhity Commission, 48 F.R. 34766 (August 1, 1983), Regarding the Documentation Section of the Uniform Guidelines on Employee Selection Procedures (Appendix C).

2. The 1984 Vote To Review the Guidelines

In July 1984, the EEOC voted to direct its staff to undertake a comprehensive internal review of the Uniform Guidelines. See Office of Management and Budget, Regulatory Program of the United States Government at 524 (Aug. 8, 1985) (statement of Chairman Thomas). To our knowledge, that vote by the full Commission did not prejudge the outcome of the review, nor did it purport to question the fundamental principles expressed in Title VII, in Griggs and Albemarle, and in the Uniform Guidelines themselves. No public notice of rulemaking has been issued, no written comments have been requested, and no public hearings or meetings have been scheduled in connection with this review.

3. The Proposals of Chairman Thomas

Although the Commission apparently has not yet completed its review of the Uniform Guidelines, EEOC Chairman Thomas has already concluded that the guidelines reflect a "fundamentally flawed approach to enforcement of the antidiscrimination statutes," and he has announced his intention to present major substantive revisions of the guidelines for a Commission vote in February 1986. See Office of Management and Budget, Regulatory Program of the United States Government at 523, 527 (Aug. 8, 1985) (statement of Chairman Thomas) ("Regulatory Program") (Appendix A).

The revisions proposed by Chairman Thomas[20] would not just eviscerate the Uniform Guidelines; they would strike at the heart of Title VII itself. Ignoring the language of the statute, the legislative evidence of congressional intent, the decisions of the Supreme Court, and the fundamental legal principles underlying not only the Uniform Guidelines but all previous testing guidelines ever adopted by any agency,[21] Chairman Thomas argues that the Uniform Guidelines

> "define 'discrimination' in employment on the basis of a mechanical statistical rule that bears no relationship to the plain meaning of that term. UGESF requires (1) that whenever there are variations beyond a narrow margin in the rates at which an employer hires or promotes people of different races, sexes, or national origins, the employer must 'validate' its selection procedure(s) according to certain highly technical standards; and (2) that employers maintain records of the races, sexes, and national origins of their employees and applicants for employment.

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[20] These proposals were submitted to the OMB by Chairman Thomas "as the head of the Agency without prior review or approval by the Commission." Regulatory Program at 523 n.1.

[21] Testing guidelines incorporating these fundamental principles have been issued at least 12 times, by five different federal agencies, through two Democratic and two Republican Administrations. The 1966 EEOC guidelines and the 1968 OFCC guidelines were issued during the Johnson Adminsistration. See supra notes 4 & 6. The 1970 EEOC guidelines and the 1971 OFCC guidelines were issued during the Nixon Administration. See supra notes 8-9. The 1976 FEA guidelines were issued by the Department of Justice, the Department of Labor, and the Civil Service Commission during the Ford Administration. See supra note 12. The 1970 EEOC guidelines were also reissued in 1976 during the Ford Administration. See supra note 13. And the 1978 Uniform Guidelines were issued by the EEOC, the Civil Service Commission, and the Departments of Justice, Labor, and the Treasury during the Carter Administration. See supra notes 15-18.

> "These regulations are founded on the premise that but for unlawful discrimination, there would not be variations in the rates of hire or promotion of people of different races, sexes, and national origins. UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral." Regulatory Program at 526.

Chairman Thomas has stated that he intends to propose broad revisions of the Uniform Guidelines to correct these perceived defects. Id. at 524. No public notice of rulemaking has been issued, no written comments have been requested, and no public hearings or meetings have been scheduled in connection with these proposals.

4. The Need for an Open Review Process

The process by which the existing Uniform Guidelines were proposed, considered, revised, and adopted was a model of "government in the sunshine." Even before publication of their draft proposal in December 1977, the enforcement agencies had circulated an earlier draft and had obtained comments from representatives of state and local governments, psychologists, private employers, and civil rights groups. In addition to publishing the December 1977 draft, the agencies published a notice of proposed rulemaking, they requested and received written comments from more than 200 organizations and individuals, and they held a public hearing and meeting at which they took testimony from representatives of private industry, state and local governments, labor organizations, civil rights groups, and professional psychologists. After considering these veiws as well as those expressed in additional informal consultations, the enforcement agencies revised the proposed draft and provided a detailed discussion of the comments they had received and the revisions they had made. The final version of the Uniform Guidelines was adopted only after a full and fair opportunity for consultation with and participation by all interested persons and organizations. See supra pp. 11-13. As courts and commentators have recognized, these careful and open procedures added to both the quality and the authority of the Uniform Guidelines.[33]

The current proposals to revise the Uniform Guidelines, by contrast, are being developed and considered through a process of "government in the shadows." At a meeting with Chairman Thomas in November 1984, after the EEOC had voted to review the guidelines, representatives of the Legal Defense Fund and the Lawyers' Committee for Civil Rights Under Law expressed their concern about the nature of the revisions under consideration, and they offered to share with the Commission both their considerable expertise in this complex field and the extensive memorandums, drafts, comments, and other materials they had prepared and compiled from the agencies and other sources over a period of several years during their participation in the development of the Uniform Guidelines.

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[33] See Note, The Uniform Guidelines: Compromises and Controversies, 28 Cath. L. Rev. at 630-31 ("since the Uniform Guidelines largely conform to rulemaking procedures outlined in the Administrative Procedure Act and represent a synthesis of agency judgments based on years of expert work, they likely will receive even greater judicial deference" than previous guidelines). See also Allen v. City of Mobile, 464 F. Supp. 433, 439 (S.D. Ala. 1978).

Not only has this offer of assistance never been accepted by the EEOC, but the proposed revisions under consideration have never even been disclosed in sufficient detail to permit these groups or other organizations or individuals to provide the Commission with potentially helpful comments and suggestions. Having failed to obtain information on the proposed revisions through informal requests, on May 17, 1985, the Legal Defense Fund filed with the EEOC a formal request under the Freedom of Information Act for information relating to the development of revisions to the Uniform Guidelines and other aspects of the EEOC's regulatory and policy agenda for 1985.[23] The EEOC responded by providing copies of four cover letters from Chairman Thomas to OMB officials but declining to provide a total of 111 pages of submissions that accompanied the cover letters. The cover letters revealed absolutely nothing about the contents of the EEOC's submissions to OMB, which were withheld on the ground that they were "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[24]

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[23] See letter to Stuart Frisch from Barry L. Goldstein dated May 17, 1985 (Appendix D).

[24] See letter to Barry L. Goldstein from Stuart Frisch dated July 2, 1985 (Appendix E).

Thus, the only hints so far as to the contents of the proposed revisions have come in the form of Chairman Thomas's vague and general statements that he wants the guidelines to recognize "that statistical disparities are not tantamount to discrimination," and "that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards." Regulatory Program at 524. We are left to speculate as to the precise revisions Chairman Thomas has in mind--an especially difficult task in view of the fact that the existing Uniform Guidelines already incorporate both of the principles he has articulated. See *infra* pp. 21-28. We urge this Committee to monitor closely the process by which these revisions are developed and considered by the EEOC, in order to insure that all concerned persons and groups will have adequate notice of the contents of the proposals and a fair opportunity to express their views on this matter of crucial importance to the effectiveness of Title VII and other antidiscrimination laws.

C. Chairman Thomas's Proposals Are Contrary to Fundamental Principles of Title VII Law.

Chairman Thomas's proposals to revise the Uniform Guidelines, while too vague and general to permit detailed review and analysis, nonetheless are sufficiently specific to reveal glaring inconsistencies between his personal views and both the facts and the law under Title VII. Chairman Thomas says that he wants to revise the guidelines to recognize "that statistical disparities are not tantamount to discrimination," and "that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards." Regulatory Program at 524. He asserts that the existing guidelines, in addition to using "a mechanical statistical rule to define 'discrimination'...," id., "assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral." Id. at 526. He suggests that the remedy for these perceived problems may lie in the elimination of requirements "that employers maintain records of the races, sexes, and national origins of their employees and applicants for employment," id., thereby making it difficult or impossible to detect the existence of adverse impact in accordance with the standards established by Congress and the Supreme Court.[25]

However, the Uniform Guidelines impose no "mechanical statistical rule," and they make no assumptions whatsoever about inferiority. On the contrary, the guidelines emphasize the need for flexibility and common sense in determining adverse impact,[24] and they expressly provide that the *same* job related standards should be applied to all persons regardless of race, sex, or national origin.[27] What the guidelines also provide--and what appears to be contrary to the views of Chairman Thomas but consistent with the statutory language, legislative history, and judicial interpretation of Title VII--is that selection procedures which have an adverse impact on minorities or women should not be used unless their relation to the job can be demonstrated in accordance with professionally acceptable validation standards. See supra pp. 4-13.

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[25] Chairman Thomas has also questioned "[u]nder what circumstances, if any, and according to what standards, does title VII require that an employer demonstrate the validity of its employee selection procedures?" Regulatory Program at 526. However, we have not been able to determine whether he has thus far made any specific proposals to revise the guidelines' technical standards for validation of selection procedures. There appears to be no sound basis for any such revisions. In a recent letter to Chairman Thomas, the Chair and Executive Officer of the American Psychological Association's Committee on Psychological Tests and Assessment stated that the new APA Standards and the existing Uniform Guidelines "are not in conflict," and that they therefore saw "no compelling reason for revising the EEOC Guidelines on technical grounds." Letter from Douglas Jackson and Michael S. Pallak to Clarence Thomas dated April 19, 1985 (Appendix F).

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[24] For example, §4D of the Uniform Guidelines, in language quoted with apparent approval by the Supreme Court in *Connecticut v. Teal*, 457 U.S. at 443 n.4, sets forth a discretionary policy under which a selection rate for any race, sex, or ethnic group which is less than four-fifths of the rate for the group with the highest rate will generally be regarded by the enforcement agencies as evidence of adverse impact. This section goes on to explain that smaller differences in selection rates may nevertheless constitute adverse impact, and that greater differences may not constitute adverse impact, depending on the circumstances. 29 C.F.R. §1607.4D The explanatory "Questions and Answers" issued by the agencies similarly state that the four-fifths policy is an administrative "rule of thumb [which] is not intended as a legal definition, but is a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion, and other selection decisions." Question and Answer No. 11, *Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11996, 11998 (1979). Noting that "[t]he determination of adverse impact is not purely arithmetic" and that "other factors may be relevant," *id*. No. 12, the agencies further state that the four-fifths policy "merely establishes a numerical basis for drawing an initial inference and for requiring additional information," *id*. No. 19, and that it "is not intended to be controlling in all circumstances." *Id*. No. 20.

Although couched in the superficially attractive language of "equality" and "neutrality," Chairman Thomas's proposals fail to take into account some of the unpleasant social facts of life in America. On the average, blacks and other minorities do not perform as well as whites and Anglos on standardized tests and other selection criteria that emphasize verbal skills and mastery of the dominant culture, and women do not perform as well as men on tests that emphasize certain mechanical and physical skills. Apart from Chairman Thomas, all informed participants on all sides of the ongoing debate about employment tests and testing guidelines appear to share this understanding of the basic facts.[28] This phenomenon of differential performance among racial and ethnic groups has long been recognized both in the leading psychology texts and in even the earliest legal articles on the subject,[29] and it was recently confirmed in a report issued by the National Academy of Sciences, which concluded as follows:

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[27] Section 11 of the Uniform Guidelines provides in part:

> "The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure--even though validated against job performance in accordance with these guidelines--cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard...." 29 C.F.R. §1607.11.

> "The salient social fact today about the use of ability tests is that blacks, Hispanics, and native Americans do not, as groups, score as well as do white applicants as a group. When candidates are ranked according to test score and when test results are a determinant in the employment decision, a comparatively large fraction of blacks and Hispanics are screened out....
>
> "So long as the groups offered protection under the Civil Rights Act of 1964 (particularly blacks and certain ethnic minorities) continue to have a relatively high proportion of less educated and more disadvantaged members than the general population, those social facts are likely to be reflected in test scores. That is, even highly valid tests will have adverse impact...." Committee on Ability Testing, National Academy of Sciences/National Research Council, *Ability Testing: Uses, Consequences, and Controversies* 143, 146 (1982) ("Ability Testing").

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[28] See, e.g., Haney, *Employment Tests and Employment Discrimination: A Dissenting Psychological Opinion*, 5 Indus. Rel. L.J. 1, 26-27 & n.131 (1982); Hunter & Schmidt, *Ability Tests: Economic Benefits Versus the Issue of Fairness*, 21 Indus. Rel. 293, 294 (1982); Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 41-42.

[29] See A. Anastasi, *Psychological Testing* 343-45 (5th ed. 1982); L. Cronbach, *Essentials of Psychological Testing* 383 (4th ed. 1984); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1638-41 (1969); Note, *Employment and Education*, 68 Colum. L. Rev. 691, 692-95 (1968).

Contrary to the apparent view of Chairman Thomas, these facts do not rest upon an assumption that blacks and Hispanics are "inferior" to whites and Anglos. Instead, they reflect the continuing legacy of racial discrimination and cultural and educational deprivation in our society, and they demonstrate the need for close investigation of any selection procedure that has an adverse impact to determine whether it is in fact job related.[30] Ironically, it is not the adverse impact standard of the Uniform Guidelines but Chairman Thomas's proposal to abolish that standard which is based upon and feeds into false assumptions. His apparent assumption that all "neutral" tests and requirements are job related is hardly warranted by the great weight of either psychological or legal authority, and if adopted it would lead to the false and destructive conclusion that, because minorities may not perform as well on these frequently irrelevant criteria, they must indeed be "inferior."

Chairman Thomas's approach would not only be contrary to the language, legislative history, and judicial interpretation of Title VII, but it would undo much of the good that has been done under the Civil Rights Act in the last twenty years. As demonstrated by Dr. Jonathan Leonard's recent comprehensive empirical study,[31] both affirmative action and Title VII "have been successful in prompting the integration of blacks into the American workplace." J. Leonard, The Impact of Affirmative Action 388 (1983). Indeed, this study examined a huge mass of data and concluded that "[c]lass action litigation under Title VII of the Civil Rights Act of 1964 has played a significant role in increasing black employment, and has had a relatively greater impact than affirmative action." Id. at 386.

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[30] As the National Academy of Sciences report concluded, the Uniform Guidelines "properly require a close investigation of any selection procedure that has adverse impact. A healthy suspicion of such selection procedures is warranted by the discriminatory behavior that has tended to characterize American society...." Ability Testing at 146.

The Uniform Guidelines and previous testing guidelines are responsible for a substantial part of the positive results that have been achieved under Title VII. Moreover, the existence and application of these guidelines have benefited not only minorities and women but also employers and society as a whole. The guidelines, which the courts have found to be entitled to "great deference,"[32] have provided enforcement agency personnel and judges with valuable assistance in interpreting Title VII in accordance with professional standards in a complex technical field. Even more importantly, the guidelines have provided employers with an effective incentive for and useful guidance in evaluating their employment tests and other selection procedures in order to determine whether those procedures have an adverse impact and, if so, whether they are job related and whether there are reasonable alternatives that would have less adverse impact. Like the prospect of liability for back pay under Title VII, the prospect of liability for violating the principles expressed in the guidelines "'provides the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" Albemarle Paper Co. v. Moody, 422 U.S. at 417-18, quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973).

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[31] This is the first unified and comprehensive empirical study of the impact of federal affirmative action regulation and anti-discrimination law on employment, turnover, and productivity. J. Leonard, The Impact of Affirmative Action iii (1983). The study examines the effects of affirmative action requirements imposed on federal contractors under Executive Order No. 11246 as well as the effects of litigation under Title VII. The affirmative action portion of the study is based on a national sample of more than sixteen million employees in nearly seventy thousand establishments, and the Title VII portion of the study is based on data from more than seventeen hundred class action lawsuits. Id.

[32] See, e.g., Griggs v. Duke Power Co., 401 U.S. at 433-34; Albemarle Paper Co. v. Moody, 422 U.S. at 431.

Because of the guidelines, employers have been motivated to examine many tests and requirements that otherwise would have remained unquestioned, and they have often found those tests and requirements to be poor measures of predicted job performance. As the National Academy of Sciences report concluded, "[e]nforcement of the Guidelines has revealed that many employment testing programs did not meet professional standards and were making no verifiable contribution to productivity." Ability Testing at 146. Many unprofessional and unproductive selection procedures have thus been discarded in favor of new tests and procedures that are more likely to be accurate predictors of job performance--and therefore more likely both to select the best qualified employees regardless of race or sex and to serve the employer's and the society's interests in maximizing productivity.

III. THE EEOC POLICY STATEMENT ON INDIVIDUAL REMEDIES

In contrast to Chairman Thomas's proposals to revise the Uniform Guidelines, the full Commission's February 1985 "Policy Statement on Remedies and Relief for Individual Victims of Discrimination" (Appendix B) contains some positive elements. The Legal Defense Fund has previously expressed its views on the legitimacy of and the need for race- and sex-conscious affirmative remedies in appropriate cases,[33] and its misgivings about attempts to portray "victim-specific" individual relief as an adequate substitute for classwide systemic relief.[34] Furthermore, the Legal Defense Fund shares the concerns expressed by others about the EEOC's unworkable September 1984 "Statement of

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[33] See Statement of William T. Coleman, Jr., Chairman, NAACP Legal Defense and Educational Fund, Inc., In Re Affirmative Action To End the Effects of Racial Discrimination and Segregation, before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee (June 11, 1981).

[34] See Statement of Barry Goldstein, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc., Regarding Equal Employment Opportunity Policy, before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, pp. 20-27 (Dec. 14, 1984).

Enforcement Policy" (announcing a policy of filing suit in every case in which "reasonable cause" is found and conciliation fails), and about the possible relationship between that statement and the Commission's more recent statement on individual remedies.[33] We continue to believe that the Commission should devise and implement vigorous and realistic enforcement policies that will be effective in correcting not only individual instances of discrimination but also systemic discriminatory practices.

Nevertheless, to the extent that the statement on individual remedies can be accepted at face value and viewed solely on its own terms, we think that it represents a useful first step in defining and explaining the kinds of relief that the Commission regards as appropriate in individual, non-systemic cases of discrimination. While we believe there is room for improvement,[34] we support a number of the specific remedies enumerated in the statement,[37] and we also support the Commission's effort to articulate its policies in this area.

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[33] See Testimony of the Lawyers' Committee for Civil Rights Under Law, Concerning the Equal Employment Opportunity Commission's Position on Remedies for Victims of Discrimination, the Commission's Enforcement Posture, Possible Changes in the Uniform Guidelines on Employee Selection Procedures, and Related Topics, before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, pp. 3-10 (July 18, 1985).

[34] For example, the statement should be revised to make it clear that the Commission does not take the inflexible and unreasonable position that every enumerated remedy must be obtained in every case in which a finding of "reasonable cause" is made, without regard to the circumstances of the individual case; to emphasize that "bumping" of incumbent employees is only available in exceptional circumstances; and to provide that respondents may be required to keep records sufficient to demonstrate compliance and to make those records available for inspection on reasonable notice.

IV. CONCLUSION

While the full Commission's February 1985 policy statement on individual remedies contains a number of positive elements, Chairman Thomas's proposals to revise the Uniform Guidelines are extremely disturbing. Not only are those proposals contrary to the language and legislative history of Title VII and the controlling decisions of the Supreme Court, but they would dismantle one of the most effective tools available to the Government for opening up employment opportunities to minorities and women. In making such proposals, Chairman Thomas is either badly mistaken about the meaning and purpose of Title VII, or he is deliberately advocating disregard for the law. In either case, he is not performing his proper function as the chief official of the agency that has been given the lead role in the Government's efforts to eradicate unlawful discrimination in employment. Instead, he is causing confusion about the Commission's policies and goals, and he is undermining the reach and effectiveness of the very statutes he is supposed to enforce. We therefore urge this Committee to monitor with great care the EEOC's review of the Uniform Guidelines, in order to insure both that the review process is fair and open and that any resulting revisions are in accord with the law.

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[37] The provisions of the statement concerning the posting of notices, the calculation of back pay, the insulation of employees from supervisors who have engaged in intentional discrimination against them, the removal of adverse materials from personnel files, and the use of agreements and orders to cease discriminatory practices all may be useful in the circumstances of a particular case.

APPENDIX A

Office of Management and Budget,

Regulatory Program of the United States Government

(Aug. 8, 1985)

(Statement of Clarence Thomas)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION[1]

OVERVIEW

Enforcement of the Federal laws against discrimination in employment should be guided by two principles:

1. Every complaint charging a violation of one of the laws should be investigated thoroughly and promptly, and every victim of unlawful discrimination should receive full and effective relief.
2. The laws should be enforced as they are written: every person should have equal employment opportunity, free from discrimination on the basis of race, color, religion, sex, national origin, age, or (with respect to employment by Federal agencies, Federal grant recipients, and Federal contractors) handicap.

Furthermore, the Federal enforcement agencies have a responsibility to explain the antidiscrimination laws to the public clearly, so that workers and employers can understand their rights and obligations.

Unfortunately, in the past the Federal enforcement agencies pursued a very different approach. The actual victims of unlawful employment discrimination were largely ignored. Even when the EEOC found that discrimination had occurred, only rarely would it commence litigation to secure relief for the victim. In the overwhelming preponderance of cases, the Commission decided that the violation was not "litigation-worthy," and the victim was left no better off than if the antidiscrimination laws had never been enacted.

At the same time, however, the Federal enforcement agencies, including the EEOC and the Departments of Justice and Labor, turned the statutes on their heads by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables, and by using rigid statistical rules to define "discrimination" without regard to the plain meaning of that term. Also, although the EEOC became responsible in 1979 for enforcing the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, and section 501 of the Rehabilitation Act of 1973, it never comprehensively addressed workers' and employers' rights and obligations under any of those statutes.

As Chairman of the EEOC, I hope to reverse this fundamentally flawed approach to enforcement of the antidiscrimination statutes. Much can be, and has been, done simply through administrative actions. To the extent, however, that the existing regulatory scheme incorporates the wrong approach of the past, I intend to propose regulatory actions to correct this situation.

THOROUGH AND PROMPT INVESTIGATION OF VIOLATIONS

Turning first to the principle of thorough and prompt investigation of complaints, and full and effective relief for victims of discrimination, the EEOC has already taken major nonregulatory actions designed to achieve this goal on behalf of all employees outside the Federal government. We have adopted a "Statement of Enforcement Policy" (September 11, 1984) and a "Policy Statement on Remedies and Relief for Individual Cases of ful Discrimination" (February 5, 1985). These statements establish our intention to seek full and effective relief for all victims of unlawful discrimination. The Commission now considers all unlawful discrimination to be "litigation-worthy," and is already implementing this commitment in the private sector.

Extending this commitment to the Federal sector, however, requires regulatory action, because the procedures for investigating and resolving discrimination complaints filed by Federal employees or by applicants for Federal employment are enshrined in a nearly incomprehensible maze of regulations. The result is inordinate and utterly unacceptable delay in investigating and resolving such complaints. Moreover, even if a complainant successfully negotiates the maze and the EEOC enters a decision against an agency, the agency may disregard our decision. My goals in this area are to streamline the process and to develop an effective mechanism to ensure that Federal agencies comply with EEOC orders resolving discrimination complaints.

EQUAL EMPLOYMENT OPPORTUNITY

Turning to the principle of enforcing equal employment opportunity, and not requiring discrimination in the name of fighting it, I intend to pursue two major initiatives. First, I intend to propose a revision of the Uniform Guidelines on Employee Selection Procedures (UGESP), which were adopted in 1978 by the EEOC, the Civil Service Commission, the Department of Justice, the Department of Labor (Office of Federal Contract Compliance Programs), and the Department of the Treasury (Office of Revenue Sharing).

The premise underlying UGESP is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins who are hired or promoted by that employer. (For example, it is assumed that if an employer hires 60 percent of the white males who apply for employment, unless the employer engages in unlawful discrimination it will also hire about 60 percent of the black females who apply.) UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination."

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[1] In accordance with E.O. 12498, these materials were submitted by the Chairman of the Commission as the head of the Agency without prior review or approval by the Commission.

The premises underlying UGESP are conceptually unsound because (1) blacks, Hispanics, other minorities, and women are not inherently inferior, and (2) statistical disparities in the rates at which an employer hires or promotes people of different races, sexes, or national origins may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination. Moreover, the use of a mechanical statistical rule to define "discrimination" encourages employers to discriminate in order to secure the work-force composition necessary to satisfy the statistical rule.

After a unanimous vote of the Commission last July, our staff began a comprehensive review of UGESP. At the conclusion of this review, I will propose to the Commission and to the consignatory agencies a revision of UGESP that will recognize that statistical disparities are not tantamount to discrimination, and that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards.

UGESP is applicable to all employers: private firms, State and local governments, and the Federal government. For Federal agencies, however, EEOC Management Directive 707 (MD-707) provides even more explicit direction to discriminate on the basis of race, sex, and national origin. Issued in the closing days of the Carter Administration (January 9, 1981), MD-707 purports to enforce the requirements of section 717 of the Civil Rights Act of 1964, as amended, that all personnel actions in the Federal government "be made free from any discrimination based on race, color, religion, sex, or national origin," and that each Federal agency "maintain an affirmative program of equal employment opportunity for all . . . employees and applicants for employment." In fact, however, MD-707 requires that Federal agencies discriminate, by directing them to establish employment quotas, by race, national origin, and sex, for each of their occupational series or employment categories and organizational units, and to achieve those quotas by considering the races, sexes, and national origins of employees and applicants in making personnel decisions.

I intend to propose to the Commission a replacement for MD-707 that will not require Federal agencies to adopt quotas in any form, or otherwise to discriminate on the basis of race, sex, or national origin.

CLARIFICATION OF EMPLOYEES' AND EMPLOYERS' RIGHTS AND OBLIGATIONS

I intend to undertake at least two other significant regulatory actions designed to improve employees' and employers' understanding of their rights and obligations.

First, the current EEOC regulations implementing the statutory prohibition against employment discrimination by Federal agencies on the basis of physical or mental handicap provide inadequate guidance to the agencies. This is particularly true with respect to (1) the definition of who is a handicapped person and (2) the extent to which an agency must accommodate a handicapped person's disability. I intend to propose to the Commission comprehensive policy statements on both these questions.

Second, the existing regulations interpreting the Equal Pay Act of 1963 were issued by the Department of Labor when it was responsible for enforcing the Equal Pay Act. Upon receiving that responsibility in 1979, the EEOC stated (44 FR 38671) that while it was not adopting DOL's interpretations of the Act, employers could continue to rely upon those interpretations until the EEOC issued its own, "to the extent that they are not inconsistent with statutory revisions and judicial interpretations."

Under these conditions, the existing regulations are almost useless to employers and employees because it is almost impossible for them to know which regulations the EEOC deems effective and which it considers to have been overruled. Indeed, the continued publication of those regulations in the Code of Federal Regulations is misleading because the EEOC's 1979 "proceed at your own risk" notice is not published along with the regulations. Thus, anyone not aware of that notice might understandably think that the regulations may be relied upon in their entirety.

It is therefore imperative that the existing Equal Pay Act interpretations be rescinded. It is less clear, however, whether they should be replaced by new interpretative regulations or a general statement of enforcement policy, or whether the Equal Pay Act should be left to speak for itself. The Commission's staff is now reviewing the advantages and disadvantages of the alternatives, and I intend to make a proposal to the Commission at the conclusion of that review.

SIGNIFICANT REGULATORY ACTIONS

Prerule Stage

FEDERAL AGENCIES' AFFIRMATIVE PROGRAMS OF EQUAL EMPLOYMENT OPPORTUNITY (PREVIOUSLY USED TITLE: EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT)

Problem To Be Solved

Section 717(a) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e16(a)), provides that all "personnel actions affecting employees or applicants for employment [in the Federal government] shall be made free from any discrimination based on race, color, religion, sex, or national origin." Section 717(b) of the Act, 42 U.S.C. 2000e-16(b), requires that each Federal department and agency submit to the EEOC "a national and regional equal employment opportunity plan . . . in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment."

Notwithstanding the statutory requirement that all Federal personnel actions be free from discrimination, on January 9, 1981, the EEOC issued Equal Employment Opportunity Management Directive 707 (MD-707), which requires that Federal personnel actions be based upon race, sex, and national origin. Specifically, MD-707 directed each Federal agency and department to determine whether the percentage of its employees from each race and national origin group, by sex, in each of its occupational series or employment categories, is the same as the participation rate for each race and national origin group, by sex, in the civilian labor force. Wherever any group was found to be "underrepresented," the agency or department was to set numerical "goals" for hiring and promoting members of that group, and to set aside hiring and promotion opportunities for members of such groups in order to achieve those "goals."

It is necessary to revise MD-707 in order to prevent employment discrimination by Federal agencies.

Need For Federal Solution

This Management Directive applies solely to Federal agencies and can only be revised by the EEOC.

Approach

We have identified the following questions as potential policy issues to be resolved:

1. Section 717(b) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(b), requires that every Federal agency "maintain an affirmative program of equal employment opportunity." What are proper elements for such a program?
2. Should Federal agencies set goals and timetables for hiring individuals on the basis of their race, sex, and national origin?
3. What action should the EEOC take if a Federal agency refuses to comply with a rule, regulation, order, or instruction issued by the EEOC pursuant to section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16)?

Alternative responses to these issues are still being identified.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Preparation of new Management Directive completed	September 1985
Consultation with other agencies, if Commission approves new Management Directive	October-December 1985
Issuance of new Management Directive if approved by Commission	January 1986

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EQUAL PAY ACT INTERPRETATIONS

Problem To Be Solved

In 1965 the Department of Labor (DOL), which was then responsible for enforcing the Equal Pay Act of 1963, issued a set of interpretations of the Act. DOL amended its interpretations in 1967.

Between 1967 and 1979, the Fair Labor Standards Act, of which the Equal Pay Act is an integral part, was amended three times. There were also a number of court decisions, including *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), rejecting or questioning aspects of the DOL interpretations. Therefore, in 1979, when the EEOC received responsibility for enforcing the Equal Pay Act, the Commission declared (44 FR 38671) that while it was not adopting the DOL interpretations, until the EEOC issued its own interpretations employers could continue to rely upon the DOL interpretations "to the extent that they are not inconsistent with statutory revisions and judicial interpretations."

The EEOC's 1979 notice is not published in the Code of Federal Regulations with the DOL interpretations. Therefore, a person reading those interpretations might mistakenly think they may be relied upon in their entirety. Moreover, the EEOC has never indicated which provisions of the DOL interpretations it considers to be "inconsistent with statutory revisions and judicial interpretations." Thus, not even employers and employees who are aware of the 1979 notice have any reliable guidance concerning the EEOC's interpretation of their obligations and rights under the Equal Pay Act.

Need For Federal Solution

The EEOC has primary responsibility for enforcing the Equal Pay Act.

Approach

The following alternative solutions have been identified:

1. The Commission could issue new interpretative regulations. The advantages of this alternative would be that employers would have the EEOC's interpretation of the statute, the prior DOL regulations would be updated to reflect statutory changes and judicial development, and, the EEOC's interpretations would be widely disseminated and readily available to employers. Regulations would benefit the EEOC to the extent that they facilitate enforcement, employers to the extent that they facilitate voluntary compliance, and employees to the extent that compliance is more easily or quickly achieved. The regulations would not impose any costs not imposed by the statute itself.
2. The Commission could issue a statement of enforcement policy, instead of interpretative regulations. The advantage of this alternative is that employers would be apprised of the enforcement agency's interpretation. The disadvantages are that the DOL's regulations might still be in the Code of Federal Regulations and the EEOC's enforcement policy might not be as widely disseminated or readily available to employers as interpretative regulations would be.
3. The Commission could announce that the DOL regulations can no longer be relied upon without issuing anything to replace them. The advantage would be that it is the least costly alternative for the EEOC to implement. The disadvantages are that employers would not have general guidance from the enforcement agency, the agency's enforcement efforts might be slowed by case-by-case development of policy and precedent, and employees might not be aware of their rights.

New regulations would offer employers greater certainty concerning how to comply with the Equal Pay Act. Thus, they would eliminate the costs associated with the present risk of unintentional noncompliance.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Commission decision concerning whether to issue new regulations	September 1985
Publication of notice that employers may not rely upon existing regulations (if Commission decides not to issue new regulations)	November 1985
Proposed rule presented to Commission (if Commission decides to issue new regulations)	May 1986

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UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Problem To Be Solved

The Uniform Guidelines on Employee Selection Procedures (UGESP, 29 CFR Part 1607), which were promulgated in 1978 (43 FR 38290), define "discrimination" in employment on the basis of a mechanical statistical rule that bears no relationship to the plain meaning of that term. UGESP requires (1) that whenever there are variations beyond a narrow margin in the rates at which an employer hires or promotes people of different races, sexes, or national origins, the employer must "validate" its selection procedure(s) according to certain highly technical standards; and (2) that employers maintain records of the races, sexes, and national origins of their employees and applicants for employment.

These regulations are founded on the premise that but for unlawful discrimination, there would not be variations in the rates of hire or promotion of people of different races, sexes, and national origins. UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral.

Considering the premises underlying UGESP, it is necessary to reexamine these regulations.

Need For Federal Solution

Enforcement of title VII of the Civil Rights Act of 1964, as amended, is a responsibility of the Federal government.

Approach

Among the potential policy issues to be resolved are the following:

1. Under what circumstances, if any, is it a violation of title VII if the percentage of applicants of any particular race, sex, or national origin hired by an employer is different from the percentage hired of any other race, sex, or national origin?
2. Under what circumstances, if any, and according to what standards, does title VII require that an employer demonstrate the validity of its employee selection procedures?

3. What records, if any, should employers be required to keep, and for how long, concerning the race, sex, and national origin of their employees, former employees, and applicants for employment?

Alternative approaches and/or solutions are still being identified.

The goal of any revision of UGESP would be to implement a more rational, effective, and efficient approach to the enforcement of title VII. Such a revision would be consistent with the Administration's regulatory principles because it would have a net benefit to society by helping to eliminate unlawful employment discrimination.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Proposed rule presented for Commission vote	February 1986

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EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

Problem To Be Solved

A General Accounting Office report (GAO/FPCD-83-21, April 7, 1983) chronicled problems that were present in the system for resolving charges of unlawful discrimination filed by Federal employees or applicants for Federal employment. The EEOC has already addressed the internal management of its role in this process, but most of the problems were, and continue to be, the result of the system itself. This system's complex structure has been characterized by an inordinate length of time for processing complaints of discrimination (an average of 524 days is taken to issue final agency decisions), duplication of fact development, multiple levels of decision making, heavy involvement by respondent agencies in investigating and ruling on complaints regarding their own conduct, and inadequate mechanisms to ensure compliance with final orders issued at the completion of the process.

Need For Federal Solution

This action relates solely to employees of Federal agencies and to applicants for employment in the Federal government.

Approach

We have identified the following questions as potential policy issues to be resolved:

1. What is the most efficient process for resolving complaints of unlawful discrimination filed by Federal employees or by applicants for Federal employment?
2. What action should the EEOC take if a Federal agency refuses to comply with a final adjudication by the EEOC of a discrimination complaint filed by a Federal employee or by an applicant for Federal employment?

Alternative responses to these issues are still being identified.

This action is consistent with the Administration's regulatory principles because it will have a net benefit to society by helping to eliminate unlawful discrimination in the Federal government. In addition, it will result in more efficient and effective enforcement of the statutory prohibitions against discrimination by Federal agencies.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Proposed rule, if any, presented for Commission vote	November 1985
Publication of final rule, if any	March 1986

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EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT: HANDICAP

Problem To Be Solved

The Commission is processing an increasing volume of complaints alleging handicap discrimination by Federal agencies in violation of section 501 of the Rehabilitation Act of 1973. Our review of these complaints, our communications with other Federal agencies, and the state of judicial case law on this subject matter indicate that there are at least two major issues where the Commission's existing regulations are inadequate and further guidance is necessary: (1) the appropriate definition of handicapped individuals who are protected by Federal statutes from discrimination and/or on whose behalf affirmative action is to be undertaken, and (2) the extent to which an agency must accommodate these individuals' disabilities.

The commission's regulations contain a very general definition of "handicapped person." This definition has been subject to a wide array of interpretations. Most of these interpretations have related to the definition's use of the phrase "substantially limits one or more major life activities" in describing the nature of the physical or mental impairment that brings a person within the definition. The regulations also require that Federal agencies provide reasonable accommodation to otherwise qualified handicapped applicants and employees, but provide little guidance beyond listing some of the factors that should go into deciding whether a particular accommodation is reasonable and would not impose an undue hardship on the operations of the agency.

Need For Federal Solution

The elimination of handicap discrimination in Federal employment is a uniquely Federal responsibility based upon Federal statutory authority.

Approach

The Commission could amend its regulations on handicap discrimination to clarify the definition of "handicapped person" and/or the extent of required accommodations. Alternatively, the Commission could issue interpretative guidelines, such as management directives, that would provide guidance on the proper interpretation of existing regulatory language. Another alternative would be to disseminate Commission decisions in individual cases actively and systematically, in order to allow other agencies to draw their own conclusions from the Commission's reasoning. Of course, various combinations of these three sorts of actions are also possible.

Amending the regulations probably would entail the most administrative costs in time, money, and resources, while disseminating Commission decisions would entail the least. Conversely, amended regulations would carry the most weight, and decisions the least, in the sense of the likelihood of the guidance being noticed and followed and thereby achieving the desired benefits of less discrimination and better, more efficient decision making. None of these forms of action would impose direct costs on the public, although the costs and benefits of accommodations themselves, both to the government and to the individuals, may vary, depending on the ultimate resolutions of these issues.

The ultimate objective of whatever alternative the Commission undertakes will be to improve the performance of the Commission and other Federal agencies in fulfilling their civil rights responsibilities. The reduction in ambiguity and the uncertainty it spawns is expected to permit more efficient prosecution of these responsibilities. Improved guidance may prevent or reduce the need for using the long and expensive complaint processing systems. Also, if successful in the Federal sector and applied to the statutes conditioning Federal grants and contracts, this sort of guidance might reduce existing disincentives to dealing with the Federal government.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Publication of proposed rule, if any . . .	January 1986

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APPENDIX B

EEOC "Policy Statement on Remedies and Relief for Individual Victims of Discrimination"

(Feb. 5, 1985)

EEOC: Policy Statement on Remedies and Relief for Individual Victims of Discrimination

Following is the full text of an EEOC policy statement, adopted by the commission on February 5, 1985, that sets forth EEOC's position on remedies for individual victims of employment discrimination. The statement says that individual discrimination victims will be assured increased and "make-whole" relief, including back pay and an "unconditional" offer of the job denied, with possible bumping of another employee. The approach is aimed at standardizing and enhancing the remedies the agency will seek in conciliation, in court, and in federal sector decisions.

EEOC POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL CASES OF UNLAWFUL DISCRIMINATION (TEXT)

On September 11, 1984, the Equal Employment Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency's law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices.

Predictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit and has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated. The remedy must be fashioned from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

1) A requirement that all employees of respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found or conciliated will not recur;

2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;

3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial elements are as follows:

(1) *Notice Requirement*

All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or to union members if respondent is a labor organization), prepared by the agency on E.E.O.C. forms, specifically advising respondent's employees or members of the following:

(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.

(b) That Federal law requires that there be no discrimination against any employee or applicant for employment because of the employee's race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).

(c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

(d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred or is conciliating, or which the Commission or a court has found to have occurred.[1]

(e) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court.[2]

(2) *Corrective, Curative or Prevention Provisions*

In appropriate circumstances, a remedy must provide that the respondent take corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or prevention measures may also be adopted in those situations where those measures are likely to prevent future similar violations.

Thus, where a policy or practice is discriminatory, the policy or practice must be changed. Similarly, if a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action so that the discriminatee or similarly situated employees not be subjected to similar discriminatory conduct. This corrective action may be accomplished, for example, by insulating employees from that individual for a period of time, or by requiring the respondent to discipline or remove the offending individual from personnel authority, or by requiring the respondent to educate the offender and other supervisors so that they may overcome their unlawful prejudices. These and any other appropriate measures, or any combination thereof, designed to meet this goal should be considered when negotiating settlements or drafting prayers for relief. This type of relief is not to be designed for punitive purposes. Rather, this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the chance of its recurrence.

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[1] For example the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case:

"XYZ, Inc. will not refuse to hire employees on the basis of their sex;

"XYZ, Inc. will not refuse to promote employees on the basis of their sex or their race; and

"XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment Opportunity Commission."

[2] For example, employees could be notified of the relief obtained in the following way:

"XYZ, Inc. will promote and make whole the employees affected by our conduct for any losses they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the position of shift supervisor and will be made whole for any loss in pay or benefits they may have suffered since the time that we failed to promote them to that position.

"XYZ, Inc. has adopted an equal employment opportunity policy and will ensure that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race."

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminatee's personnel files.

(3) *Nondiscriminatory Placement*

Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another of respondent's employees ("Nondiscriminatory Placement"). The Nondiscriminatory Placement may place by initial employment, reinstatement, promotion, transfer or reassignment and must occur without any prejudice to, or loss of, any employment-related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

If a Nondiscriminatory Placement position that the discriminatee should occupy no longer exists, then employment for which the discriminatee is qualified must be offered to the discriminatee in other areas of the respondent's operation. Finally, if none of the foregoing positions exist in which the discriminatee may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and that respondents not gain by their misconduct. Accordingly, the contention by a respondent that a discriminatee is no longer suitable for Nondiscriminatory Placement due to a loss of skills, a change in job content or some other reason is not an acceptable excuse for a respondent's failure to accomplish a Nondiscriminatory Placement of a discriminatee. The burden is upon the respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is also on the respondent to demonstrate a contention that post-discrimination conduct by a discriminatee renders the discriminatee unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job displacement of another of the respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

(4) *Backpay*

Each identified victim of discrimination is entitled to be made whole for any loss of earnings the discriminatee may have suffered by reason of the discrimination. Each individual discriminatee must receive a sum of money equal to what would have been earned by the discriminatee in the employment loss through discrimination ("Gross Backpay") less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted ("Net Interim Earnings"). The difference between Gross Backpay and Net Interim Earnings is Net Backpay Due. Interest should be computed on all Net Backpay

Due. Net Backpay Due accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuations in working time, overtime rates, changing rates of pay, transfers, promotions, and other perquisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and the Age Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) *Cessation Provisions*

All respondents must agree or be ordered to cease from engaging in the specific unlawful employment practices involved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including broad cessation language in an agreement or order which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of conciliation requires the agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this scope, conciliation must be actively pursued by the agency. In this regard, in all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counterproposals to the full range of remedies described in this policy may be considered if those compromises or counterproposals address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

APPENDIX C

Comments of the NAACP Legal Defense and Educational Fund, Inc., Pursuant to the Request for Comments Published by the Equal Employment Opportunity Commission, 48 F.R. 34766 (Aug. 1, 1983), Regarding the Documentation Section of the Uniform Guidelines on Employee Selection Procedures

INTRODUCTION AND SUMMARY

The EEOC has published a request for comments on the recordkeeping obligations relating to the determination of adverse impact as set forth in the Uniform Guidelines on Employee Selection Procedures. 48 F.R. 34766 (August 1, 1983).

These comments are submitted on behalf of the NAACP Legal Defense and Educational Fund, Inc. The Legal Defense Fund has had substantial involvement in the enforcement of the fair employment laws and Title VII.[1] In particular, the Legal Defense Fund has had substantial experience in litigation concerning testing and other selection practices. The Legal Defense Fund has been counsel in the two leading Supreme Court cases[2] and in numerous appellate court cases[3] which have applied selection guidelines promulgated by the federal government and which have set the standards for the application of Title VII to employment tests.

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[1] For example, the Legal Defense Fund has been counsel in the following employment cases in the Supreme Court: *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 549 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Albemarle Paper Company* v. *Moody*, 422 U.S. 405 (1975); *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976); *Brown* v. *General Services Administration*, 424 U.S. 280 (1976); *IUE* v. *Robbins & Myers*, 429 U.S. 229 (1976); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981); *Gulf Oil Co.* v. *Bernard*, 422 U.S. 89 (1981); *American Tobacco Company* v. *Patterson*, 456 U.S. 63 (1982); *Pullman-Standard Company* v. *Swint*, 456 U.S. 273 (1982); *United States Postal Service* v. *Aikens*, 51 USLW 4343 (1983).

[2] *Griggs* v. *Duke Power Co.*, *supra*; *Albemarle Paper Company* v. *Moody*, *supra*.

[3] See e.g., *Hameed* v. *Ironworkers*, 637 F.2d 506 (8th Cir. 1980); *James* v. *Stockham Valves & Fittings, Inc.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); *Kirkland* v. *N.Y. Dept. of Corrections*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

COMMENTS OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. PURSUANT TO THE REQUEST FOR COMMENTS PUBLISHED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 48 F.R. 34766 (August 1, 1983), REGARDING THE DOCUMENTATION SECTION OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

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- Question 5. 17
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- Question 7. 20

Furthermore, the Legal Defense Fund has participated in the process which led to the adoption of the Uniform Guidelines.[4] We think that the more than 15 years of experience which the LDF has had in this area permits us to provide a worthwhile contribution to the deliberations of the EEOC concerning the recordkeeping provisions of the Uniform Guidelines.

In enacting Title VII Congress granted broad authority to the EEOC to require recordkeeping. Congress understood that the achievement of the fundamental purpose of Title VII, such as the removal of discriminatory barriers to employment opportunity, required the maintenance of records which would permit employers, federal agencies, and others to recognize practices that required reconsideration and modification or termination. The Uniform Guidelines and the sections on documentation serve their functions and should not be diluted. (Section I).

As shown by our comments to the seven questions presented by the EEOC, the Uniform Guidelines were carefully developed and do not require modification except for the section regarding the "bottom-line" defense which should be changed in light of the Supreme Court decision in Connecticut v. Teal. (Section II).

4/ See e.g., Letter from Barry Goldstein, Mike Baller and Debbie Greenberg to Dave Rose, dated September 29, 1975; Comments of LDF on the publication of the proposed Federal Executive Agency Guidelines, August 11, 1976; Comments submitted by LDF to Drew S. Days, Assistant Attorney General for Civil Rights, November 29, 1977; Comments of LDF on the publication of the proposed Uniform Guidelines, March 8, 1978; Testimony presented on behalf of LDF by Barry Goldstein before the Civil Service Commission, EEOC, Department of Justice, and Department of Labor on April 10, 1978.

Question 1. The documentation section achieves a proper balance between requiring essential information without attempting to dictate the all-but impossible task of listing precisely what data an employer must maintain in every employment context. It may be that greater specificity may be shown to be important in the future; however, we have perceived no such requirement at the present.

Question 2. The Guidelines provide the user with significant flexibility in determining the type and form of the records which should be maintained. Given the importance of having adequate information for determining adverse impact and for enforcing the fair employment laws and given the little burden which rests upon the user for the retention of records because of the flexibility of the Guidelines, we do not think that a rigid time-limit for the retention of data is appropriate.

Question 3. When enacted the Guidelines did not address the issue of whether the "bottom line" defense is valid. The Supreme Court has now rejected this defense. The Guidelines require modification in order to provide for documentation of the individual components of a selection procedure even where the entire procedure shows no adverse impact.

Question 4. Where a user fails to maintain data on the impact of a selection procedure, as is required by law, the federal agencies should apply a strong presumption that there is adverse impact. If the user is covered by the Executive Order, the OFCCP should commence enforcement proceedings.

I. THE PROPER IMPLEMENTATION OF TITLE VII REQUIRES AN EFFECTIVE DOCUMENTATION SECTION INCLUDING REQUIREMENTS FOR THE DOCUMENTATION OF ADVERSE IMPACT.

The Congress recognized the importance of recordkeeping and the documentation of employment decisions and practices if the purpose of Title VII is to be achieved. Section 709(c) of Title VII provides as follows:

> Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program.

The provision establishes the broad authority of the EEOC to require employers and others to maintain records as may be "appropriate for the enforcement of" Title VII. The Congress did not set any time limit upon the EEOC. Moreover, as stated in the

Question 5. The Legal Defense Fund has no comments on this question.

Question 6. The use of the term "applicant" is described appropriately in Question and Answer 15. A definition of the term applicant as suggested by the Ad Hoc Group and referred to by the GAO would serve to facilitate rather than inhibit the use of discriminatory selection procedures.

Question 7. In the preparation of the Guidelines the Federal Agencies considered the burden on users in establishing the documentation section. The section is appropriate and does not apply any unnecessary or inappropriate burden.

House Judiciary Committee Report,[5] "[t]he Commission is directed [by §709(c)] to require each employer ... which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of [Title VII]...." H.R. Rep. No. 914, 88th Cong., 1st Sess., as quoted in EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964, 2030.[6]

The determination of the impact of selection practices on the employment opportunities of sex, racial or ethnic groups is essential in order to enforce a fundamental purpose of Title VII -- "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. at 429-30; Albemarle Paper Co. v. Moody, 422 U.S. at 417. "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). Only if accurate data concerning the impact of selection procedures is available for employers to self-evaluate, for federal agencies to monitor compliance with the law, and for federal agencies and private parties to use in enforcement litigation will the potential of Title VII for removing discriminatory barriers to equal employment opportunity be fully realized.

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[5] Section 709(c) of the Civil Rights Act of 1964 was contained in the bill reported by the House Judiciary Committee and adopted by the House. The Senate did not make any change in Section 709(c). EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 1017-18, and 2013.

[6] The provisions of §709(c) quoted in the text were not amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261.

In enacting §709(c) Congress realized the importance of employees being required to maintain adequate records. In enacting the Uniform Guidelines the federal agencies properly implemented the congressional purpose. The federal agencies should maintain the commitment to effective enforcement of the fair employment laws contained in the Uniform Guidelines.

II. COMMENTS REGARDING THE SEVEN QUESTIONS PRESENTED BY THE EEOC.

> Question 1. Should the Uniform Guidelines define more specifically the information that a user of a selection process must maintain to show whether its selection procedures have an adverse impact on the basis of race, sex, or ethnic origin? If so, what information (such as applications, applicant flow data, pass/fail data) should the Guidelines require?

No. The Uniform Guidelines instruct employers as to the type of records required to document adverse impact in both the General Principles and Documentation sections. Section 4A provides that the user should have records or other information available which "will disclose the impact which its test and other selection procedures have ... by identifiable race, sex, or ethnic group." The section provides that, where there are large numbers of applicants a proper sample may be retained. Section 15(c) requires that users "should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any" of the specified groups. The section requires that the adverse impact determination only be made on annual basis and only for groups that constitute at least 2 percent of the labor force.[7]

The Uniform Guidelines also define adverse impact, section 16B,[8] and set forth various circumstances which may affect the determination of adverse impact, such as the size of the selection rates; the extent, if any, which the user's practices discourage applicants disproportionately on grounds of race, sex, or ethnic group; the implementation and results of any special recruiting efforts. Section 4D.

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[7] The two limitations on the determination of adverse impact -- to be done only on an annual basis and only for groups that comprise 2 percent of the workforce -- were added to the section in order to reduce the recordkeeping requirements without diluting the section's enforcement potential.

[8] "A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines."

The Guidelines take a sensible approach to defining adverse impact, indicating various circumstances which may influence adverse impact, requiring users to maintain records or other information indicating the impact, adverse or otherwise, of their selection practices, and affording users leeway in determining the best method for making and recording the determination. The Guidelines attempt to set forth the basic information that is required in order to enable a user to self-evaluate and to comply voluntarily with the law or to permit the EEOC or others to evaluate the practices of a user and, if necessary, commence enforcement actions. The Guidelines do not attempt to set forth the specific information that should be retained in varying employment contexts. The documentation section on adverse impact appears to achieve a balance between requiring essential information without trying to dictate exactly what information employers should maintain in many different contexts. If further specificity proves important it should be added. But, at present, we see no such need.

> Question 2. Should the Uniform Guidelines state retention period for the records that a user is required to maintain? If so, state what period and reasons. If not, state reasons.

No. It appears implicit in this question that the retention of records required pursuant to the sections under consideration,

§§15A (1) and (2), may be onerous and burdensome.[9] The implication that the regulations are burdensome does not pass scrutiny. It cannot be fairly asserted that the "simplified recordkeeping for users with less than 100 employees" may be onerous regardless of how long the users are required to keep the records. The user simply must record and then keep some straightforward information:

> "(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;
>
> (b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and
>
> (c) The selection procedures utilized ...."

This information may be recorded on one or two pieces of paper and certainly would not constitute a burden to maintain.

The Guidelines for other users require the maintenance "for each job records or other information showing whether the total selection process for the job has an adverse impact on any group...." Section 15A(2). The regulation does not require that original documents, for example, application forms, selection notices, etc., be maintained. Once again the Guidelines provide for flexibility and accommodation to the recordkeeping or employment system of the user.

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[9] The General Accounting Office report, Uniform Guidelines on Employee Selection Procedures Should Be Reviewed and Revised (July 30, 1982), raises the issue of the failure to place a time limit on the retention of adverse impact data. *Id.* 8. The Report merely refers to the fact that "Guidelines' users said that, if a clear time limit for retaining the records were established, unneeded documentation could be discarded." The Report does not discuss the actual provisions nor their interrelationship with other recordkeeping provisions.

The documentation guideline and any determination as to a proper retention period must be analyzed in conjunction with the recordkeeping regulations of the EEOC, 29 CFR §1602 et. seq. The EEOC requires that,

> Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General against an employer under Title VII, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or action. (Emphasis added).

§1602.14. This necessary regulation applies to decisions taken by selection procedures. Accordingly, where a charge is filed with the EEOC which implicates a selection procedure then the user must maintain all the records relating to the selection procedure until the disposition of the charge.

The EEOC requires employers to preserve personnel records "for a period of 6 months from the date of the making of the record or the personnel action involved...." §1602.14. The EEOC further requires employers, labor organizations, etc., which control aprpenticeship programs to preserve the list of applicants or application forms for at least 2 years, §1602.21, and state and local governments to preserve personnel records for 2 years, §1602.31.

These and other recordkeeping regulations of the EEOC require employers to preserve the actual records. As set forth above, the Uniform Guidelines are more flexible.[10] There are good reasons for the flexibility of the Guidelines and the failure to set a specific time limit. The purpose of the recordkeeping provisions in §15A(1) and (2) is to determine whether a selection procedure ~~has~~ adverse impact. If only a few selection decisions are made each year from the use of a selection procedure and if the data for only a few years are available, then it will be impossible to evaluate accurately whether there is adverse impact. The time-period required in order to determine the adverse impact of a selection procedure will vary.

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[10] The recordkeeping regulations apply to users covered by the Uniform Guidelines.

Furthermore, the flexibility of the Guidelines regarding how the information on adverse impact is maintained minimizes any burden that may arise from preserving the data. For example, a careful user may decide to preserve the original business records, applications, etc., for a two-year period. If no charge under Title VII or comparable law has been filed the user may then maintain a summary of the impact of the selection procedure. The preparation of a summary is necessary, in any event, because the user must determine annually whether the selection procedure has any adverse impact.

As a result of the flexibility of the Guidelines there is little burden in the maintenance of adverse impact data. Certainly, the user should be required to maintain data on adverse impact for as long as the data may be relevant to an investigation or action brought pursuant to Title VII, the Executive Order, or other fair employment law. At present, the periods covered by investigation and lawsuits under Title VII or the Executive Order is a matter of some dispute -- at least one Court of Appeals has stated that acts of illegal discrimination even if they occurred prior to two years before the filing of a charge "affect the measurement" of back pay.[11] Given the flexibility of the Guideliens and the resulting minimal burden on users and the possible relevance of adverse impact data to fair employment investigations and lawsuits even if they occurred well before the filing of the charge, it is improper to set specific time period for the retention of adverse impact data.

> Question 3 Under the current Uniform Guidelines, a user is not generally expected to evaluate the individual components for adverse impact if the total selection process does not have an adverse impact. See 29 CFR 1607.4C (1980). The U.S. Supreme Court decision in Connecticut v. Teal, 50 U.S.L.W. 4716 (1982), however, held that identifiable components of a selection process which have an adverse impact on minorities must be shown to be job related notwithstanding that the "bottom line" percentages evidence no adverse impact. Should the Uniform Guidelines require users to maintain records to disclose the impact of a component of a selection process even where the overall selection process does not have an adverse impact?

11/ The District of Columbia Circuit has held that "it is proper to allow acts of illegal discrimination lying beyond the two-year period of Title VII back pay accrual to affect the measurement of the award." Thompson v. Sawyer, 678 F.2d 257, 291 (D.C. 1982).

The issue regarding the period of recovery and scope of investigation to be permitted under the Executive Order is unclear since the proposed regulations have not been acted upon.

Yes. When drafted the Guidelines "did not address the underlying question of law" as to whether the "bottom line" defense was valid. "Supplementary Information," 43 Fed. Reg. 38291 (1978), quoted in BNA, FEP Manual §401:2231, 2234. The Supreme Court has now addressed the issues -- the "bottom line" is not a valid defense.[12] Connecticut v. Teal, 73 L.Ed 2d 130 (1982). The Court held that the bottom line defense had to be rejected because

> Title VII guarantees [the black plaintiffs] the opportunity to compete equally with white workers on the basis of job-related criteria. Title VII strives to achieve equality of opportunity by rooting out "artificial, arbitrary and unnecessary" employer-created barriers to professional development that have a discriminatory impact upon individuals. (Emphasis in original).

Id. at 139-40.

The Guidelines should reflect the unequivocal statement of the law by the Supreme Court -- selection procedures which have an adverse impact on a sex, racial or ethnic group and which are not job related are unlawful even if the overall selection process does not have an adverse impact.[13] Accordingly, the Guidelines should require that a user must analyze identifiable components of a selection process in order to determine whether they have adverse impact and must preserve records or other information regarding the adverse impact of identifiable components of the selection process.[14]

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[12] It is particularly instructive that the Supreme Court expressly rejected the arguments in support of the "bottom line" defense set forth in the Brief filed by the Department of Justice. Connecticut v. Teal, 73 L. Ed 2d at 140. The EEOC declined to join the Justice Department's brief. Id. at 140 n.11.

[13] The administrative agencies may still consider evidence that the overall process does not have a discriminatory impact in the application of their prosecutorial discretion.

> Question 4. What steps should be taken by Federal enforcement agencies for failure to maintain required records under the Uniform Guidelines? Should, for example, an adverse inference be imposed?

Yes. The Guidelines already provide that,

> [w]here the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or in the case of jobs filled from within, the applicable work force.

§4D.

In the circumstances set forth in §4D the federal agencies, absent compelling circumstances, should always presume adverse impact. Having created, maintained and implemented the selection system, and having been clearly instructed by federal guidelines to maintain impact data, a user cannot reasonably complain that a presumption of adverse impact is drawn under the circumstances set forth in §4D.[15] The Courts have held that circumstantial evidence of adverse impact in conjunction with the failure of the employer to produce the actual data conclusively establishes adverse impact and shifts the burden of proof to the employer to establish that the practice is job related. See e.g., James v. Stockham Valves & Fittings, Inc., 559 F.2d at 335-38.

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[14] We note that the suggested modification of the Guidelines would require a change in §4C as well as in §15A.

[15] See e.g., Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977) ("Presumptious shifting the burdenn of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. See C. McCormick, Law of Evidence §§337, 343 (2d ed. 1972); James, Burdens of Proof, 47 Va. L. Rev. 51, 61 (1961))."

The failure to maintain adverse impact data seriously undercuts the ability of the federal agencies to monitor and investigate compliance with the law. Accordingly, as a matter of policy the Labor Department should apply sanctions against any user covered by the Executive Order who is unable to show special circumstances which justify a failure to maintain the required data.

> Question 5. Since the adoption of the Uniform Guidelines, EEOC has acquired authority over ADEA, 29 U.S.C. 621 et. seq., and has adopted ADEA regulations that apply the technical principles of the Uniform Guidelines to ADEA. Therefore, should the test users be required to maintain records under the Commission's guidelines based on age as well?

The Legal Defense Fund has no comments on this question.

> Question 6. For the purpose of maintaining data to determine adverse impact, should the Uniform Guidelines provide a definition of the term "applicant"? If so, how should the term "applicant" be defined? See Q&A #15, EEOC Questions and Answers to Clarify and Provide a Common Interpretation of UGESP, 44 FR 11998 (March 2, 1979).

No. The use of the term "applicant" suggested by Question and Answer 15 is appropriate.[16]

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[16] "15.Q. What is meant by the term[ ] 'applicant' ... as [it is] used in the Uniform Guidelines?

Footnote continued

The question perhaps originated from the comments made by the General Accounting Office. Uniform Guidelines on Employee Selection Procedures Should Be Reviewed and Revised at 7-8. The GAO Report states that "Guidelines users argue that a more workable definition of applicant is needed."[17/] The GAO appears to agree. It asserts that if the approach is carried to an extreme, "an employer could use a definition of applicant which effectively screens out all potential employees of a particular race, sex, or ethnic group." The GAO does not state how this could be done or, if done, how the user could escape detection. Such an approach by an employer could just not be taken in good faith given the broad description of the term applicant in Answer 15. The Guidelines cannot prevent an employer from acting in bad faith.

The difficulty of a rigid definition is well-illustrated by the example used by the GAO. The Report refers to the suggestion

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footnote continued

"A. The precise definition of the term 'applicant' depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice."

[17/] If the users to whom the Report refers were interested in the implementation of fair employment principles in an appropriate manner, one would think that they would favor the flexible approach suggested in Answer 15. This approach permits users to use the concept of applicant in a manner which is meaningful and appropriate in their employment context. Their opposition to the flexible approach and their suggestion of a rigid definition is especially suspect in light of their suggested approaches which the GAO accepted uncritically. See Text.

by "the Ad Hoc Group on Uniform Guidelines [that an applicant be defined] as a person who has completed and filed a formal written application for a specific job for which an employer was accepting applications and the person was minimally qualified for the job."

Ironically, the definition suggested by the Ad Hoc Group provides a mechanism which would permit employers to do exactly what the GAO proposed that the current approach might do -- effectively exclude a disproportionate share of a protected group from being included among the "applicant" group. The point may be made by a few hypothetical examples:

a. The completion of an application form is a type of selection procedure which may have an adverse impact and which may be unrelated to job performance.

b. The person who distributes the application form may be instructed only to give a form to an individual who has a certain educational level or certain experience. The criteria for the distribution of an application form may have adverse impact and may be unrelated to job performance.

c. A company or union may only distribute a limited number of applications which may go largely to the family or friends of present employees. This process may be discriminatory.

d. A company may retain an application form for use in selection for a job which may arise in the future even though the specific job for which the application was made was filled by another applicant. The manner by which personnel officers retain application forms or refer to pending forms may be discriminatory.

e. The definition of "minimally qualified" is not obvious. Duke Power Company argued that employees had to have a high school diploma in order to be minimally qualified. The Supreme Court disagreed. Griggs, supra.

> Obviously, a "minimally qualified" standard may have an adverse impact and be unrelated to job performance.

> Question 7. How can the paperwork burden of the Uniform Guidelines be reduced without diminishing the protection of the Guidelines?

As is clear from the prior comments, it is our view that the Guidelines provide a reasonable, flexible and appropriate approach to the documentation of the impact of selection practices.

APPENDIX D

Freedom of Information Act Request:
Letter from
Barry L. Goldstein
to
Stuart Frisch
dated May 17, 1985

HAND-DELIVERED

Legal Defense Fund

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC
99 Hudson Street, New York, N.Y. 10013 • (212) 219-1900

806 Fifteenth Street, N.W., Suite 940
Washington, D.C. 20005 • (202) 638-3278

May 17, 1985

Mr. Stuart Frisch
Acting Associate Legal Counsel
for Legal Services
Equal Employment Opportunity
Commission
2401 E Street, N.W.
Room 214
Washington, D.C. 20506

Re: Freedom of Information Act Request

Dear Mr. Frisch:

This is a request under the Freedom of Information Act, as amended, 5 U.S.C. §552.

I am requesting a copy of each and every letter, submission, memorandum, overview, list, analysis, or other document sent by the Equal Employment Opportunity Commission, Chairman Thomas, or any other Commissioner from January 1, 1985, to the present, to the Office of Management and Budget or any official or staff member of OMB pursuant to Executive Order No. 12498, OMB Bulletin No. 85-9 or to any memorandum and/or notice issued by any official or staff member of OMB regarding the regulatory or policy agenda of the EEOC for 1985.

The FOIA also provides that if only portions of a file are exempted from release, the remainder must be released. I therefore request that I be provided with all non-exempt portions which are reasonably segregable. I, of course, reserve my right to appeal the withholding or deletion of any information.

I am prepared to pay reasonable costs for locating the requested file and reproducing it. The amended Act does provide, however, that you may reduce or waive fees if it "is in the public interest because furnishing the information can be considered as primarily benefitting the public." I believe this request plainly fits that category because the information requested may be used in determining the manner in which the public policy of preventing or remedying employment discrimination is being implemented by EEOC and the areas where private

Contributions are deductible for U.S. income tax purposes

The NAACP LEGAL DEFENSE & EDUCATIONAL FUND is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget.

enforcement may be especially necessary. I am employed by the NAACP Legal Defense and Educational Fund, Inc. (LDF). LDF is a non-profit organization which has "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The information requested will assist LDF in determining appropriate means for enforcing the fair employment laws. I therefore ask you to waive any fees. If you rule otherwise, and if the fees will exceed $50.00, please inform me of the charges before you fill my request. If the copying fees will exceed $50.00, I request permission to review the records which are responsive to this request and to select those which I want copied.

If you have any questions regarding this request, please telephone me at 202-638-3278.

As provided in the Freedom of Information Act I will expect to receive a reply within ten working days.

Sincerely,

Barry Goldstein

Barry L. Goldstein
Assistant Counsel
NAACP Legal Defense and
  Educational Fund, Inc.

APPENDIX E

Freedom of Information Act Response:
Letter from
Stuart Frisch
to
Barry L. Goldstein
dated July 2, 1985

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

RECEIVED ... 8 1985

F' 2

Barry L. Goldstein, Esquire
Assistant Counsel
NAACP Legal Defense and
  Educational Fund, Inc.
806 Fifteenth Street, N.W., Suite 940
Washington, D. C. 20005
CERTIFIED NO. P31 8560285
RETURN RECEIPT REQUESTED

In Reply Refer To: 85-5-FOIA-104

Dear Mr. Goldstein:

Your Freedom of Information Act (FOIA) request asks for:

> ... a copy of each and every letter, submission, memorandum, overview, list, analysis, or other document sent by the Equal Employment Opportunity Commission, Chairman Thomas, or any other Commissioner from January 1, 1985, to the present, to the Office of Management and Budget or any official or staff member of OMB pursuant to Executive Order No. 12498, OMB Bulletin No. 85-9 or to any memorandum and/or notice issued by any official or staff member of OMB regarding the regulatory or policy agenda of the EEOC for 1985.

The materials responsive to your request are:

(1) a February 25, 1985 letter with accompanying 34 page submission under Executive Order No. 12498 and OMB Bulletin No. 85-9;

(2) an April 22, 1985 letter with accompanying 40 page submission;

(3) a May 16, 1985 letter with accompanying 14 page submission;

(4) a June 25, 1985 letter with accompanying 23 page submission.

Your FOIA request is being granted in part and denied in part. The four letters are being provided to you and are enclosed. The accompanying submissions are denied pursuant to the fifth exemption of the Freedom of Information Act.

The fifth exemption states that an agency may withhold records which are: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The language of this exemption is cast in terms of discovery and recognizes "that agencies should not lose the protection traditionally afforded through the evidentiary privilege simply because of passage of the FOIA." Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980), citing Environmental Protection Agency v. Mink, 410 U.S. 73, 83 (1973). Encompassed by the exemption is the deliberative process privilege which serves to protect against premature disclosure of proposed policies before they are adopted, and communications which would reveal the deliberative process. Russell v. Department of Air Force, 682 F.2d 1045 (D.C. Cir. 1982).

As of this writing all the submissions regarding Executive Order No. 12498 are correspondence between the OMB and this agency vis-a-vis the formation of policy. This policy formation has not yet been finalized. Therefore, the requested information falls within the fifth exemption.

If you wish to appeal the denial of your request, you may do so within 30 days after receipt of this letter by writing to Allyson Duncan, Acting Legal Counsel, Equal Employment Opportunity Commission, 2401 "E" Street, N.W., Washington, D.C. 20507. You must attach this letter to your appeal letter. Your appeal would be governed by the provisions of 29 C.F.R. Section 1610.11.

Sincerely,

Stuart Frisch

Stuart Frisch
Acting Associate Legal Counsel
Legal Services

APPENDIX F

Letter from Douglas Jackson
and Michael S. Pallak
to
Clarence Thomas
dated April 19, 1985,
re: APA Standards for Educational
and Psychological Tests

American
Psychological
Association

April 19, 1985

Mr. Clarence Thomas, Chair
Equal Employment Opportunity Commission
2401 E Street, NW
Suite 5
Washington, DC 20507

Dear Mr. Thomas:

We understand that the present Uniform Guidelines on Employee Selection Procedures are being reviewed, with an eye to possible revision. The latest version of the Standards for Educational and Psychological Testing, which will be published in June of 1985, will be useful in your work. The Committee on Psychological Tests and Assessment believes that although these Test Standards could help to clarify the present EEOC guidelines, the two documents are not in conflict. Therefore, we see no compelling reason for revising the EEOC Guidelines on technical grounds. However, if a revision is undertaken, we request the opportunity to provide consultation and advice on the scientific and technical aspects of the EEOC guidelines.

Sincerely,

Douglas Jackson

Douglas Jackson, Ph.D., Chair
Committee on Psychological
Tests and Assessment

Sincerely,

Michael S. Pallak, Ph.D.
Executive Officer

bcc: Colleen Cordes
2641s

1200 Seventeenth St. N.W.
Washington, D.C. 20036
(202) 955-7600

Mr. MARTINEZ. I think we were given that commitment, to share all in there open process.

Mr. Robinson.

Mr. ROBINSON. Thank you, Congressman Martinez, and other members of the committee. I very much appreciate the opportunity to appear before you again this morning.

I hope that my full statement will be included in the record. And that being the case, I will not seek to summarize all of it this morning.

I do want to say to the committee, especially to Mr. Gunderson, that I do stand by all the things that are stated in our prepared testimony. I want to take issue with Mr. Thomas and his suggestion that in this testimony we make irresponsible statements without backup. If you will look at the document, you will see that there is backup. We quote Mr. Thomas often, and accurately.

Mr. MARTINEZ. Your testimony will be included in the record in its entirety.

Mr. ROBINSON. Thank you, sir.

We cover in our testimony a number of concerns that were indicated in the letter of invitation. I want to confine my remarks this morning only to those issues related to the EEOC Testing Guidelines.

The first thing I want to do is I want to cover a couple of background points about the status of these guidelines and emphasize where they stand today.

First, I want to reemphasize that these guidelines did not come into being full grown like Athena from the head of Zeus. When title VII was passed, the law, despite your best efforts, was not clear. It did not tell us lawyers, or companies, or unions, or others operating under it exactly what were the standards under which we were to proceed.

So it required some 6 years of litigation—litigation of literally thousands of cases in the district courts, hundreds of cases in the courts of appeals, and a small number of cases in the Supreme Court of the United States. That took a lot of time.

But after that extended period of 6 years and lots of litigation—and litigation is both costly and just tremendously debilitating to the parties involved in it. It takes a tremendous toll. We did get some clear-cut rules, particularly in *Griggs* v. *Duke Power,* where the Supreme Court of the United States accepted and wrote into law the basic principles that are also contained in the EEOC Testing Guidelines. The Court expressly deferred to those guidelines and relied upon them. You would think that having your basic rules for governing your statute, having been written into the law by the Supreme Court, you had reached the zenith. Not so.

The Supreme Court had a second occasion to review these same guidelines and these same basic rules in *Albemarle Paper Co.* v. *Moody,* and underscore their earlier ruling in *Griggs* v. *Duke Power,* so that the basic principles of the testing guidelines and the basic rules under which we operate under title VII have been endorsed here by the Supreme Court, not once, but twice. A more solid grounding in the law, I cannot imagine.

Second, the statute, as Professor Blumrosen and others have mentioned, makes express reference to professionally developed tests. There is one particular profession and branch of it that are the recognized experts in this area are within the American Psychological Association. And there's no question but that the basic principles of the EEOC testing guidelines reflect the standards of the American Psychological Association—and I want to emphasize here that these are not just pronouncements by detractors, naysayers, or cynics. The principles which the psychologists of the American Psychological Association announced, and which are incorporated into the guidelines reflect research involving millions, literally millions, of individuals; research conducted by hundreds of awfully high ranking, high standing, conscientious professionals.

The basic principles of the guidelines as they are written today reflect those professional standards, and the president of the American Psychological Association has so written to the Chairman of the Equal Employment Opportunity Commission.

Third, by way of background as to the status of these guidelines, I want to emphasize that they are accepted by industry all across the country—plant managers, directors of personnel, and others, rely on these guidelines on a day-to-day basis as they make critical personnel decisions related to the filling of the jobs at their places of concern, and more particularly, as they address themselves to the task of trying to open up their employment to minorities, women, who have been previously excluded, and to do so on a basis that is fair, equitable—they rely on these guidelines. There is no clamor from them for sweeping revisions of these guidelines.

I have referred often to the basic principles of these guidelines I would like now to say what they are. They are two. First, where a test or other employment selection device, has the effect of excluding a disproportionate number of blacks, let's say, then; two, the second basic principle, the employer or person seeking to rely on that test, must demonstrate that it is job related. That is, that it selects based on the ability to perform the job rather than some other factor.

Now, I want to turn my attention to the nature of the review which EEOC has undertaken here. The review is not a matter of fine tuning these guidelines. I want to be clear that we would not object to fine-tuning of the guidelines. There are some technical or other matters related to the guidelines that could be fine tuned. Reasonable people can disagree as to some particular facets of the guidelines. I am sure if employers would want some changes and fine tuning, they would probably get some. We have got our own wish list and we would want some changes, and I suspect we would get some. Reasonable people can disagree about those things, but I suspect that if we were engaged in dialog and discussion, we would probably also agree on some of them also.

We are not talking about fine tuning here, we are talking about, first, according to the chairman's own submission to OMB, a direct attack on those two basic principles.

First, he attacks the principle of adverse impact. That is a showing that the test is exclusionary as being incorporated into the guidelines. He makes that attack apparently on the basis that statistical disparities are tantamount to discrimination and that they require some rigid application, and so forth.

The answer to that is, of course, the answer which the Supreme Court gave in *Griggs*, and I want to quote directly their caution with respect to the use of statistics under these guidelines and the basic principles that we are talking about. The Court cautioned, using the following words:

> We caution only that statistics are not irrefutable, they come in infinite variety, and like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances.

Chairman Thomas, to the extent he has got a legitimate concern there with respect to this use of statistics in making a showing of adverse impact, has been answered. That concern provides absolutely no legitimate basis for reviewing the guidelines. His concern is reflected in the law as written, or interpreted, by the Supreme Court of the United States. There's no basis for him to go forward based on that concern.

Second, he expressed the view that the guidelines assumed the inherent inferiority of blacks, and that's reflected in his statement to OMB when he is saying he wants standards that will based on the idea that minorities and women are fully capable of competing on the basis of race and sex neutral standards.

I want to make clear that these guidelines do not assume the inherent inferiority of blacks. That just plays no role here. All they do is require that you make a showing that the test you are using relates to the job. How that involves any assumption about the inherent inferiority of blacks or anybody else is beyond me, and it's beyond me for the simple fact that it does not make that assumption.

But Chairman Thomas' position does make an assumption. It makes the assumption that any race or sex neutral standard is a fair basis upon which to select employees, and that's wrong. There are all manner of race or sex neutral standards that are obviously not a fair or appropriate means of selecting employees. Professor Blumrosen quite eloquently explored one of them—that is the use of height and weight restrictions in selection police officers.

So I have covered, then, the two bases for reviewing the guidelines contained in the submission to OMB.

Now I want to spend a few minutes with the only other basis for this thorough and total review of the guidelines, and that is the EEOC's outline of issues for the UGESP review, the part in my memorandum which Mr. Gunderson partially quoted in this dialogue with Chairman Thomas. I want to pick up at the part where you stopped quoting, sir.

The outline asks the following questions. The first one is whether the holding in Griggs has been eroded by Stotts, referring to the recent Supreme Court's decision in the *Memphis Fire Fighters* case. That's probably one of the most controversial decisions rendered within the last several years. And not surprisingly, it has been the subject, then, of numerous law review articles and other critiques. Indeed, I even wrote one myself.

But nobody, none of the commentators have ever suggested that Stotts had anything to do with Griggs. To ask that question is simply silly. Whether the Griggs holding, that practices with disparite impact are unlawful unless shown by the employer to be job-related is "consistent with the fourteenth amendment." Well, after all, it's the Supreme Court decision reiterated twice. I fail to say how that's a proper basis—that question—for undertaking a total and thorough review of the guidelines.

Whether the EEOC testing guidelines should be cut loose from the professional standards of the American Psychological Association, that question continues. Again, I suggest that the question does not provide a proper basis for a review of the guidelines. The statute itself directs the agency toward professionally developed standards. All the witnesses here this morning and elsewhere, I think, will agree that it has to be tied to such standards.

I want to conclude—and thank you for your indulgence with respect to the time—I want to conclude by suggesting that there is no proper basis for a thorough and total review of the guidelines. The EEOC should be strongly urged by this committee, and I mean all members of it, to terminate that review. The other Commissioners have views. They should be urged to bring the matter before the Commission. If you are going to go forward with a review, tailor that review to those kinds of issues that really can involve fine-tuning or other appropriate questioning of the guidelines. They do have some responsibility there, nobody denies that. But stop spreading the confusion throughout the employer community, the civil rights community, the labor community, and elsewhere, that the basic rules that we all now rely on are going to somehow be overturned. That is inappropriate.

[The prepared statement of William L. Robinson follows:]

PREPARED STATEMENT OF WILLIAM L. ROBINSON [1] AND RICHARD T. SEYMOUR [2] ON BEHALF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you today on a series of efforts by the present leadership of the U.S. Equal Employment Opportunity Commission to change settled procedures and rules of law in a way which will seriously undermine the ability of minorities and women to be free of discrimination in employment.

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LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

A. Introduction

The Lawyers' Committee is a nationwide civil rights organization, with local offices in Washington, Philadelphia, Boston, Chicago, Jackson, Denver, Los Angeles, and San Francisco. It was formed by the leaders of the American Bar in 1963, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. Over the years, the national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics, and women in hundreds of class actions in the fields of employment discrimination, voting rights, equalization of municipal services, and school desegregation. Well over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association, and other leading lawyers, have assisted us in these efforts.

B. The Need for Clear Standards of Compliance With Title VII

During the now more than twenty years that Title VII of the Civil Rights Act of 1964 has been in effect, the courts and the litigants in tens of thousands of lawsuits have worked out an effective set of principles for applying the commands of that law. The Equal Employment Opportunity Commission helped to an immeasurable degree in developing these principles, through its development of Guidelines interpreting the law's demands and laying down realistic standards showing employers what was expected of them, and through the filing of *amicus curiae* briefs providing expert guidance to the courts.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

For the first several years of that twenty-year history, the actual enforcement of the law was delayed until the basic ground rules had been settled by the courts. Initially, many courts concentrated on individual claims and did not focus on the classwide nature of the wrongs in question. When they did focus on classwide wrongs, they granted relief to only the few individuals who had filed EEOC charges, and denied relief to the hundreds or thousands of other blacks, Hispanics, or women who had been harmed by the identical practices. When the courts dealt with the merits of the cases, they had to resolve the objections of employers who were uncertain as to the weight to be given statistical proof of discrimination. When they dealt with facially neutral practices which had the effect of excluding large percentages of minority or female applicants---such as an employment test or an educational requirement---they were uncertain whether Title VII applied to such practices, and what the standard should be for deciding whether such practices were unlawful.

Slowly, painfully, in hundreds of district court cases, scores of cases in the courts of appeals, and a handful of cases in the Supreme Court, the legal standards applicable to Title VII cases were clarified. The process took five or six years, and cost tens of millions of dollars in legal fees. Until these standards were resolved, little real enforcement activity could take place and in fact little real enforcement activity did take place.

The benefits of clear standards should be apparent to all reasonable persons: when employers and unions know the legal standards applicable to their conduct, they can change unlawful practices and thereby open the doors of opportunity to minorities and women without a lawsuit ever having to be filed; when trial courts know the standards to be applied, they can resolve cases more quickly, holding down the legal costs of prosecuting and defending cases and making most appeals unnecessary.

It is in the interests of no one---not employers, not unions, not minorities or women---to cast new doubt on the standards to be applied, so that real enforcement activities are stalled for another five or six years while the courts pass on the legality of proposed substitute standards. During that time, employers would have no clear means of predicting which practices will be found unlawful and which lawful, so that they can structure their employment practices in conformity with the law.

For these reasons, there is no pressure from anyone---not employers, not unions, not minorities or women---to change the basic standards by which Title VII liability is determined. The efforts by the current leadership of the EEOC to change these standards are based solely on the extreme personal views of its highest officials, without regard to any practical considerations and without regard to the commands of the law.

C. The Administration, Including the Leadership of the EEOC, is Seeking to Convert Title VII Into a Statute Requiring Direct Proof of Discriminatory Purpose Before a Violation Can Be Found

1. Statistical Proof of Discrimination

For fifty years, the Supreme Court has made clear that statistical evidence is competent and reliable to prove discrimination. In 1935, the Supreme Court so held in a jury discrimination case, Norris v. Alabama.[3] In 1971, the Supreme Court held that Title VII prohibited facially neutral, objective standards such as educational requirements and tests if the standards excluded disproportionately high numbers of minorities or women, and if the employer could not show that the standards in question had a reasonable relationship to the actual requirements of the job. Plaintiffs had the burden of producing the statistics showing adverse impact, and the burden then shifted to the employer to show that the standard in question was job-related. Griggs v. Duke Power Co.[4] In 1977, the Supreme Court again stressed the importance of statistical proof of discrimination:

> "In any event, our cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. ... We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases, ... Statistics are equally competent in

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[3] 294 U.S. 587 (1935).

[4] 401 U.S. 424 (1971).

> proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. ... "

431 U.S. at 339-40. In footnote 20, the Court rejected the employer's argument that § 703(j) of Title VII meant that statistics should not be given decisive weight:[5]

> "Evidence of longlasting and gross disparity between the composition of a workforce and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. ... . 'In many cases, the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.'"

431 U.S. at 339.

Each of these decisions was unanimous on this point. No Supreme Court decision in the last fifty years has been inconsistent with these principles. Not one single Justice, of all that have served on the Court over the last fifty years, has disagreed with these principles. Plaintiffs and defendants alike are comfortable with these standards.

Yet, the current leadership of the EEOC has without the slightest factual or legal justification sought to cast doubt on these standards. In the August 8, 1985 Regulatory Program of the United States Government, Chairman Thomas of the EEOC complained that:

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[5] At the hearings held by this Subcommittee on July 23, 1985, Administration officials relied on § 703(j) to support the notion that the EEOC could not lawfully require agencies to compare their own utilization of women and minorities with the available labor force, and to take action when substantial deficiencies were found.

> "[T]he EEOC and the Departments of Justice and Labor, turned the statutes on their heads by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables, *and by using rigid statistical rules to define "discrimination" without regard to the plain meaning of that term*."

Id. at p. 523 (emphasis supplied). He stated that he intended "to reverse this fundamentally flawed approach to enforcement of the anti-discrimination statutes." *Id.* Without even bothering to mention the Supreme Court's unanimous decision in *Griggs*, he criticized the Uniform Guidelines on Employee Selection Procedures because they incorporated a statistical definition of adverse impact:

> "UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term 'discrimination'".

Id. at p. 524. Without even mentioning the Supreme Court's unanimous decision on this point in *Teamsters*, he promised to propose to the EEOC Commissioners "a revision of UGESP that will recognize that statistical disparities are not tantamount to discrimination ... ." *Id.* In an interview with the *New York Times*, he criticized the EEOC's past reliance on statistical proof of discrimination as being inappropriate.[6] In an interview with the *Washington Post*, he directly attacked the *Griggs* decision as "over-extended and over-applied" because it had been applied to positions above the level of common laborer.[7] (In point of fact, the Griggs case itself involved positions such as Control Operator and Pump Operator at the Power Station, Machinist, Electrician-Welder, Lab and Test Technician, Superintendent, Plant Engineer, and so forth. See the decision of the district court at 292 F.Supp. 243, 245 (M.D.N.C., 1968).)

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[6] "Changes Weighed in Federal Rules on Discrimination", *New York Times*, December 3, 1984, pp. A1, B16. A copy of the article is attached to the Lawyers' Committee's December 14, 1984 testimony before this Subcommittee.

Commissioner Webb has also criticized the Uniform Guidelines' reliance on statistics.[8] Various Commissioners have travelled to conferences and meetings of EEOC staff and criticized reliance on statistical proof.

In the single most irresponsible instance, anonymous senior officials of the EEOC criticized the use of statistics by the EEOC itself in its case against Sears, Roebuck & Co., while the case was awaiting decision by the court:[9]

> "In this case, administration officials privately make little secret of their desire to lose the case, and lose it in a way that would explode any chance for future EEOC officials to bring class-action suits on the basis of statistics indicating that women or minorities are underrepresented in a company's workforce."

If the EEOC believes that the particular statistics used in the

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[7] "EEOC Chief Cites Abuse of Racial Bias Criteria", Washington Post, December 4, 1984, p. A13. A copy of this article is attached to the Lawyers' Committee's December 14, 1984 testimony before this Subcommittee.

[8] Bureau of National Affairs, EEOC Compliance Manual, News and Developments Section for May 17, 1985, p. 4.

[9] "Despite Class-Action Doubts, EEOC Presses Sears Bias Case", Washington Post, July 9, 1985, p. A1. A copy of this article was attached to the Lawyers' Committee's testimony before this Subcommittee on July 18, 1985.

EEOC case are not adequate, it should voluntarily dismiss the case for that reason. Conversely, if the statistical proof meets legal standards, the EEOC should continue prosecuting the case. Either way, it is simply not proper to keep litigating the case in court while telling the press that it hopes to lose.

The net result of the kinds of statements the leadership of the EEOC have been making is that some EEOC district offices are extremely confused. At one office, we have been told that a charging party's statistical proof will not be considered unless the charging party produces a witness who has direct personal knowledge of an express intention by company officials to discriminate. At another office, an attorney we work with was told that a charging party's statistical proof will not be considered unless the charging party can list the names and addresses of all persons affected by the practices alleged to be discriminatory. An EEOC official in a local office has informed us that the regional EEOC office has instructed that office not to investigate any disparate-impact claims. The result of all this confusion is that EEOC offices are simply churning out notice after notice of no reasonable cause to believe discrimination has taken place, regardless of what the facts available to them actually show.

2. The EEOC's Current Review of the Uniform Guidelines on Employee Selection Procedures

In our December 14, 1984 testimony, we described the background of the Uniform Guidelines on Employee Selection

Procedures, and the way in which the Guidelines carry out the command of § 703(a)(2) of Title VII, prohibiting the discriminatory classification of applicants and employees, and carry it out in the manner required by the unanimous decisions of the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). We described the close relationship between the present and former Guidelines and the professional standards developed by the American Psychological Association, a relationship which is essential in order for the Guidelines to be given judicial deference.[10]

No civil rights group would oppose a review of the Guidelines to determine whether they should be "fine-tuned" to take account of the new standards of the American Psychological Association, even though Association officials have informed Chairman Thomas that there is no conflict between the new APA Standards and the Guidelines.[11] The business community would undoubtedly have a number of changes they would like to see, and civil rights groups have their own "wish list" of changes. In a responsible review, employers would probably get some of the changes they want, but not all, and we would probably get some of the changes we want, but not all. All of the changes would involve the kinds of things about which reasonable people can differ, and everyone could live with the result.

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[10] The statutory protection for tests in § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), is for "professionally developed ability tests" only. The Guidelines define the term "professionally developed", making use of the appropriate professional standards.

[11] April 19, 1985 letter of Michael S. Pallak, Ph.D., Executive Officer of the American Psychological Association, and of Douglas Jackson, Ph.D., Chair of the APA Committee on Psychological Tests and Assessment, to Chairman Thomas. A copy of the letter is attached as Attachment B.

The EEOC's current review bears no relation to such a "fine-tuning". Chairman Thomas's own statements describing the review are so extreme that they make clear his intent to try to overrule _Griggs_ and _Albemarle Paper_ by Commission vote. In the _Regulatory Program of the United States Government_, he makes the bizarre contention that

> "UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting they should not be held to the same standards as other people, even if those standards are race and sex neutral."

The starting point of his analysis is that every facially neutral "qualification" is absolutely connected to merit. In the real world, this is clearly untrue. Many tests, for example, do little more than test applicants to see how familiar they are with the cultural terms and assumptions of the person who developed the tests. To take a concrete instance, the U.S. government's former Professional and Administrative Career Examination was given nationwide for 118 different job categories. In addition to the fact that it almost totally froze blacks and Hispanics out of consideration for jobs, _it also froze out whites from the South and Southwest_. The rate at which whites in the Atlanta and Dallas Civil Service Regions scored at a level high enough to be hired (90 and over) was less than two-thirds of the rate at which whites in the New York and San Francisco Civil Service Regions scored at this level. The government could not justify its use of the test because of the requirements of Griggs, Albemarle Paper, and the Uniform Guidelines: it literally had no credible evidence that the test had any demonstrable connection with ability to perform the job. If Chairman Thomas succeeds in his effort to repeal these standards, even such a useless test could never be challenged successfully.

The EEOC's "Outline of Issues for the UGESP Review"[12] further demonstrate that the current review bears no relationship to any "fine-tuning" or updating of the existing Guidelines, but is instead nothing more than an effort to repeal existing law. The Outline asks the following questions:

---whether the holding in Griggs has "been eroded by Stotts?"

---whether the Griggs holding that practices with disparate impact are unlawful unless shown by the employer to be job related is "consistent" with the 14th Amendment?

---whether employers should have the benefit of a "cost defense" in seeking less discriminatory procedures?

---whether the EEOC's testing guidelines should be cut loose from the professional standards of the American Psychological Association, notwithstanding the fact that the exemption for tests in § 703(h) of the statute, 42 U.S.C. § 2000e-2(h), is only for "professionally developed ability tests".

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[12] A copy is attached as Attachment C.

These "issues" are wholly frivolous, and their "review" can serve no proper purpose.

3. The Extraordinary Secrecy of the EEOC's Review of the Uniform Guidelines

Over the years, the EEOC's original short 1966 guideline on tests has been revised several times. In 1971, the EEOC issued a more elaborate set of Guidelines. In 1976, the Departments of Justice and Labor, and the Civil Service Commission, adopted the Federal Executive Agency Guidelines. In 1978, these agencies and the EEOC adopted the present Uniform Guidelines. Each of these updates was the result of a totally open process. The agencies involved publicized their drafts, so that employers, the psychological profession, and civil rights groups knew what the agencies were doing at all times and had an ongoing opportunity to comment and make suggestions while the process was going on.

The input of people and interest groups from outside the government, at the very start of the process, was crucial to the success of the ultimate revisions. Psychologists, employers, and civil rights groups are involved every day with hard, practical questions concerning the meaning and application of the present guidelines. With the best will in the world, government employees working in isolation could not hope to come out with a revision as practically workable, and as acceptable, as the kind of revision resulting from the practical input of all concerned.

Civil rights groups have met with Chairman Thomas, and have offered their expertise to the EEOC in connection with the current review. In a meeting in November 1984, we and the NAACP Legal Defense and Educational Fund offered to make available all of our files on the past revisions so that Mr. Zuckerman and the other inexperienced EEOC staff with primary responsibility for the review would have the benefit of knowing all of the considerations which led to the adoption of the present provisions. Our offer was not accepted.

We have asked for a copy of the EEOC's documents showing the issues which are being examined, so that we could give the EEOC our thoughts on those matters. We have not been given any such documents, and the EEOC has kept us in the dark as to what it is doing.

Despite the fact that any new guidelines must be tied closely to professional standards if they are to be accepted by the courts, the EEOC has not bothered to contact the American Psychological Association for its technical assistance. On April 19, 1985, the APA expressly requested "the opportunity to provide consultation and advice on the scientific and technical aspects of the EEOC guidelines."[13] The EEOC has not given it the opportunity.

Despite the obvious interest of employers in participating in the development of the standards by which they will be judged, we understand that employer groups, too, have been frozen out of the process.

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[13] See note 11 above.

Despite the responsibility of EEOC Commissioners to ensure that the agency's activities are conducted in conformance with the law and with the established policies of the Commission, not even the Commissioners have been informed of the details of the review.

There is no good reason for such extreme secrecy. Even assuming what is unlikely---that the current review is a legitimate effort to update the Guidelines and not an effort to repeal Griggs and Albemarle Paper---developing new guidelines in isolation from knowledgeable groups and then springing a near-final set of new guidelines on us at a public-comment period shortly before they go into effect will make it quite likely that the new standards will contain ambiguous and impractical provisions making compliance unnecessarily difficult. Where problems are truly avoidable, it is much better to avoid them.

4. The EEOC's Position on Remedies

a) The EEOC's September 11, 1984 Statement of Enforcement Policy

On September 11, 1984, the EEOC issued its "Statement of Enforcement Policy" stating that it intended to file suit in every case in which reasonable cause was found and conciliation had failed, and that "[o]ne finding of discrimination is no more 'worthy' of litigation than any other finding of discrimination." Statement at 2. We do not consider this goal to be possible, practical, or even desirable.

First, the Commission has informed its local offices, inconsistently with this Statement, that it will not consider for litigation any systemic charge in which "reasonable cause" has been found unless specific individual victims---presumably in addition to the charging party---are located and interviewed. It is often difficult to identify such victims on the basis of the limited information which can be obtained in an EEOC investigation; in our own enforcement cases, the identification of specific victims often requires the development of a full trial record. In many cases, such as those in which there are many more unhired minority or female applicants than there were vacancies which would have gone to minorities or women in the absence of discrimination, it is impossible to identify which specific individuals would have been hired in the absence of discrimination. Cf. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 262 n. 152 (5th Cir., 1974):

> The key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly. For instance in this case, actually to assume that employee #242 would have been promoted in three years to such-and-such job instead of employee #354 is so speculative as unfairly to penalize employee #354.

For these reasons, the courts have preferred a "classwide" approach under which all members of minority groups or women in the groups affected by the practice are presumptively entitled to individual relief. By insisting on the identification of individual victims at the start of the process, a large number of meritorious cases will never be presented for litigation approval.

Second, it is entirely untrue, as a matter of common sense, that every finding of "reasonable cause" is as worthy of litigation as every other finding of "reasonable cause". One finding may affect a thousand persons, and involve enormous losses of earnings for women or minorities. Another may involve nothing more than the legality of a day's suspension resulting in eight hours' loss of wages. An isolated claim of unlawful discharge will ordinarily be extremely important to the person discharged, but, apart from patterns of discriminatory discharge, sexual harassment cases and age discrimination cases,[14] the law enforcement value and deterrent effect of litigating that one person's discharge is ordinarily far less than that of litigating hiring and promotion issues which affect a substantial number of persons. Claims of discriminatory discharge are a large percentage of all charges received; in FY 1983, the EEOC received 85,384 charges of discrimination based on race or color. Excluding the 721 sexual harassment charges combined with allegations of racial discrimination, there were 30,991 discharge claims based on race and color. This represents more than a third of all charges of discrimination based on race or color. The EEOC could readily exhaust all of its litigation resources on handling isolated discharge claims in which cause is found and conciliation fails, without bringing this nation one step closer to true equality of opportunity.

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[14] Because of the nature of these claims, many of the most important sexual harassment cases and age discrimination cases will involve discharge. There are also some extremely important instances of patterns of discriminatory discharges involving substantial numbers of minorities or women, which it is extremely important for the Commission to challenge.

Third, the EEOC simply does not have the capability of litigating every case in which reasonable cause is found and conciliation fails. To go from a couple of hundred cases a year to a couple of thousand would risk the type of disaster exemplified by China's "Great Leap Forward". As we repeatedly urged during the Carter Administration, the EEOC should be filing far more cases than it presently files. Our urgings to the Carter Administration can be increased 150% to this Administration, in light of the enormous drop in litigation activity in this Administration. What the EEOC needs is not an immediate tenfold increase in case filings without any exercise of judgment about the impact of the cases it will file, but a sensible set of priorities as to the scope, probable impact, and number of the cases it will file.

Fourth, we fear that the EEOC will look to the attorneys in the district and regional offices to be handling individual cases, and will look to the attorneys in the systemic unit to be the only ones handling systemic cases. This would not be sensible. Many systemic cases involve local plants or facilities, and are best handled on a local basis. Every EEOC attorney, whether in a local office or Headquarters, should be looking for worthwhile systemic cases to bring.

b) The EEOC's February 5, 1985 Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination

On February 5, 1985, the EEOC issued its Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination. Some parts of the statement are quite well taken. However, we fear that the statement, taken as a whole, will hamper the Commission's efforts to obtain compliance and will sow intense racial and sexual dissension in the workplace.

First, the Policy Statement is ostensibly to be applied in "individual cases". The problem is that the Chairman considers systemic cases to be "individual" cases for purposes of this Statement. At an EEO Law Seminar in Pittsburgh on May 2, 1985, Chairman Thomas criticized his "predecessors" for choosing to:

> ... concentrate on prospective relief in the form of numerical goals and timetables, rather than full relief for the party actually filing the charge. As I noted earlier, the emphasis was not on securing full relief to charging parties, but getting rid of cases. However, there was an emphasis on obtaining broad remedies for a theoretical group which had not filed charges.
>
> I find it ironic that anyone would put a policy in place which provided less for those who were actually hurt than for those who may have been hurt as a result of some historical events. To correct this imbalance in priorities, the commission approved a policy statement which sets the remedies which our staff must seek for charging parties. ...

Speech at 10-11. If the EEOC acts in accordance with this understanding of policy, the EEOC will content itself, in a case involving a discriminatory test or other practice affecting a hundred blacks or women, to seeking relief for the one person who filed a charge, and leaving everyone else unremedied.

If this is intended to be the policy of the EEOC, it will achieve little relief in its systemic cases and the expense and burden to which the EEOC will have gone in litigating the cases will largely have gone for nought.

Second, the Policy Statement requires that a victim of discrimination be given an immediate, unconditional offer of placement in the position denied, even if this means the "bumping" of an innocent white employee or male employee. This draconian step is not limited to cases in which the "bumped" employee was the beneficiary of the unlawful discrimination; the EEOC intends to apply this remedy without regard to whether the "bumped" employee had been the beneficiary of discrimination. We doubt whether any employer would ever agree to such a step, and we doubt whether any Court would ever order such a step.[15] If such relief were ever put into effect, it would predictably result in enormous dissension in the workplace, pitting white employees against black employees, and male employees against female employees.

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[15] Under the rules of some civil service systems, and under the terms of some collective bargaining agreeements, an employee improperly awarded a position is ordinarily removed from the position until a proper selection can be made. A few courts have ordered that such provisons be exercised, but such an approach is rare, even when such special circumstances are present. There is no authority for the kind of automatic "fire the nearest white male" approach being advocated by the EEOC.

It is difficult to imagine the EEOC's rationale for junking the tried, effective, and---most importantly---widely accepted remedy of goals and timetables for filling future vacancies, in favor of an unrealistic form of relief benefitting far fewer victims of discrimination and causing so much practical difficulty. This mistaken trade-off is an excellent illustration of the present Commission's intense urge to "fix" things which are not broken.

Third, the Policy Statement indicates that "full relief", as the Statement defines it, must be obtained in every case in which a finding of "reasonable cause" is made. EEOC staff are allowed to accept less than the Policy Statement's full panoply of remedies only if the compromises "address fully the remedial concepts described in this policy." The Policy Statement concludes:

> Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

While there is some ambiguity in the Policy Statement, taken as a whole it suggests too much rigidity to give employers an incentive to conciliate a charge or settle a case, and it does not allow Commission staff to moderate settlement demands in light of the relative chances of success if the matter were to be litigated to trial.

Fourth, the Policy Statement does not mention one of the standard forms of relief in fair employment cases: requirements that the employer keep records sufficient to demonstrate compliance, that the employer report summary information to the EEOC and to the Court, and that the employer make the full records available for inspection on reasonable notice. In our experience, such relief is essential in most cases involving patterns of discriminatory activity.

Fifth, the Chairman's remarks quoted above indicate that a number of cases involving class-type patterns of discriminatory activity will nonetheless be handled under this Policy Statement.

We support the idea of posting notices of violations found and of the remedies provided; a number of the Decrees we have obtained include such relief. We support the idea of removing victims of discrimination from the supervision of individual perpetrators of subjective discrimination, where such supervisors are identified. We support the expungement of discriminatory references from personnel files. We support the backpay provisions of the Policy Statement. We caution that the Commission should not reject reasonable compromises because one of these elements is lacking; the reasonableness of the settlement package as a whole should be the guide.

D. Fixing Responsibility For These Problems

Taken together, the actions of EEOC officials represent an effort to turn back the clock to the days when no employer, no union, no court, and no plaintiff knew for certain the standards which would be applied in an enforcement proceeding. Voluntary compliance would come to a halt, and the judicial and administrative enforcement of Title VII would cease for all practical purposes while plaintiffs and defendants litigated, in tens of thousands of cases in the district courts,[16] in hundreds or thousands of cases in the courts of appeals, and in a handful of cases in the Supreme Court, the question whether the EEOC's new standards---handed down twenty years after the effective date of Title VII and in conflict with prior regulations contemporaneous with the statute---should be given any weight. Ultimately, we believe, the courts will not turn their backs on twenty years of painstaking precedent and will hold that the EEOC's new "standards" should be ignored.

Once again, it will take years for the uncertainty to be resolved; once again, many millions of dollars in legal fees will be spent in the effort; once again, minorities and women will be harmed because of the uncertainty; once again, employers will face massive back pay liability accumulated in the interim; and once again, employers will ultimately have to pay the attorneys' fees for both sides in the resolution of these questions.

It would take an extraordinary cause to justify such an effect. There is no such cause, and there is no justification for such wrenching changes. There is only the personal dislike of Chairman Thomas and some aides for the existing law, and a total lack of regard for any practical concerns.

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[16] Statistics compiled each year by the Administrative Office of the U.S. Courts show that between 9,500 and 10,000 new employment discrimination cases are filed in the Federal courts each year.

Every responsible official of the EEOC should be taking every action within his or her power to get the agency back on the right track, and to stop the frivolous wastes of the agency's resources on its campaign against the use of statistical proof, its "review" of the Uniform Guidelines, its campaign against the standards of Griggs and Albemarle Paper, and its announced goal of litigating every individual case in which "reasonable cause" was found. The EEOC has limited resources, and it should not be squandering them on such matters.

The Commissioners of the EEOC have the power to place these issues on the Commission's agenda, and to determine the policies the Commission will follow. They can stop these activities. They have failed to use their power. We urge this Subcommittee to subpoena each Commissioner to testify with respect to his or her views on each of the matters addressed above, and to urge each Commissioner to exercise his or her powers on these matters.

The EEOC's Chief of Staff, Jeffrey Zuckerman, has the responsibility to advise the Chairman on these matters. We urge this Subcommittee to subpoena Mr. Zuckerman and his notes and records showing the advice he has given the Chairman, so that he can testify with respect to his views on, and responsibility for, each of the matters addressed above.

NOTICE

There Should Be No Release
of This Document Until
6:00 P.M. (E.D.T.)
Thursday, August 8, 1985

Regulatory Program of the United States Government

April 1, 1985 - March 31, 1986

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

Attachment A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION[1]

OVERVIEW

Enforcement of the Federal laws against discrimination in employment should be guided by two principles:

1. Every complaint charging a violation of one of the laws should be investigated thoroughly and promptly, and every victim of unlawful discrimination should receive full and effective relief.
2. The laws should be enforced as they are written: every person should have equal employment opportunity, free from discrimination on the basis of race, color, religion, sex, national origin, age, or (with respect to employment by Federal agencies, Federal grant recipients, and Federal contractors) handicap.

Furthermore, the Federal enforcement agencies have a responsibility to explain the antidiscrimination laws to the public clearly, so that workers and employers can understand their rights and obligations.

Unfortunately, in the past the Federal enforcement agencies pursued a very different approach. The actual victims of unlawful employment discrimination were largely ignored. Even when the EEOC found that discrimination had occurred, only rarely would it commence litigation to secure relief for the victim. In the overwhelming preponderance of cases, the Commission decided that the violation was not "litigation-worthy," and the victim was left no better off than if the antidiscrimination laws had never been enacted.

At the same time, however, the Federal enforcement agencies, including the EEOC and the Departments of Justice and Labor, turned the statutes on their heads by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables, and by using rigid statistical rules to define "discrimination" without regard to the plain meaning of that term. Also, although the EEOC became responsible in 1979 for enforcing the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, and section 501 of the Rehabilitation Act of 1973, it never comprehensively addressed workers' and employers' rights and obligations under any of those statutes.

As Chairman of the EEOC, I hope to reverse this fundamentally flawed approach to enforcement of the antidiscrimination statutes. Much can be, and has been, done simply through administrative actions. To the extent, however, that the existing regulatory scheme incorporates the wrong approach of the past, I intend to propose regulatory actions to correct this situation.

THOROUGH AND PROMPT INVESTIGATION OF VIOLATIONS

Turning first to the principle of thorough and prompt investigation of complaints, and full and effective relief for victims of discrimination, the EEOC has already taken major nonregulatory actions designed to achieve this goal on behalf of all employees outside the Federal government. We have adopted a "Statement of Enforcement Policy" (September 11, 1984) and a "Policy Statement on Remedies and Relief for Individual Cases of ful Discrimination" (February 5, 1985). These statements establish our intention to seek full and effective relief for all victims of unlawful discrimination. The Commission now considers all unlawful discrimination to be "litigation-worthy," and is already implementing this commitment in the private sector.

Extending this commitment to the Federal sector, however, requires regulatory action, because the procedures for investigating and resolving discrimination complaints filed by Federal employees or by applicants for Federal employment are enshrined in a nearly incomprehensible maze of regulations. The result is inordinate and utterly unacceptable delay in investigating and resolving such complaints. Moreover, even if a complainant successfully negotiates the maze and the EEOC enters a decision against an agency, the agency may disregard our decision. My goals in this area are to streamline the process and to develop an effective mechanism to ensure that Federal agencies comply with EEOC orders resolving discrimination complaints.

EQUAL EMPLOYMENT OPPORTUNITY

Turning to the principle of enforcing equal employment opportunity, and not requiring discrimination in the name of fighting it, I intend to pursue two major initiatives. First, I intend to propose a revision of the Uniform Guidelines on Employee Selection Procedures (UGESP), which were adopted in 1978 by the EEOC, the Civil Service Commission, the Department of Justice, the Department of Labor (Office of Federal Contract Compliance Programs), and the Department of the Treasury (Office of Revenue Sharing).

The premise underlying UGESP is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins who are hired or promoted by that employer. (For example, it is assumed that if an employer hires 60 percent of the white males who apply for employment, unless the employer engages in unlawful discrimination it will also hire about 60 percent of the black females who apply.) UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination."

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[1] In accordance with E.O. 12498, these materials were submitted by the Chairman of the Commission as the head of the Agency without prior review or approval by the Commission.

The premises underlying UGESP are conceptually unsound because (1) blacks, Hispanics, other minorities, and women are not inherently inferior, and (2) statistical disparities in the rates at which an employer hires or promotes people of different races, sexes, or national origins may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination. Moreover, the use of a mechanical statistical rule to define "discrimination" encourages employers to discriminate in order to secure the work-force composition necessary to satisfy the statistical rule.

After a unanimous vote of the Commission last July, our staff began a comprehensive review of UGESP. At the conclusion of this review, I will propose to the Commission and to the consignatory agencies a revision of UGESP that will recognize that statistical disparities are not tantamount to discrimination, and that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards.

UGESP is applicable to all employers: private firms, State and local governments, and the Federal government. For Federal agencies, however, EEOC Management Directive 707 (MD-707) provides even more explicit direction to discriminate on the basis of race, sex, and national origin. Issued in the closing days of the Carter Administration (January 9, 1981), MD-707 purports to enforce the requirements of section 717 of the Civil Rights Act of 1964, as amended, that all personnel actions in the Federal government "be made free from any discrimination based on race, color, religion, sex, or national origin," and that each Federal agency "maintain an affirmative program of equal employment opportunity for all . . . employees and applicants for employment." In fact, however, MD-707 requires that Federal agencies discriminate, by directing them to establish employment quotas, by race, national origin, and sex, for each of their occupational series or employment categories and organizational units, and to achieve those quotas by considering the races, sexes, and national origins of employees and applicants in making personnel decisions.

I intend to propose to the Commission a replacement for MD-707 that will not require Federal agencies to adopt quotas in any form, or otherwise to discriminate on the basis of race, sex, or national origin.

CLARIFICATION OF EMPLOYEES' AND EMPLOYERS' RIGHTS AND OBLIGATIONS

I intend to undertake at least two other significant regulatory actions designed to improve employees' and employers' understanding of their rights and obligations.

First, the current EEOC regulations implementing the statutory prohibition against employment discrimination by Federal agencies on the basis of physical or mental handicap provide inadequate guidance to the agencies. This is particularly true with respect to (1) the definition of who is a handicapped person and (2) the extent to which an agency must accommodate a handicapped person's disability. I intend to propose to the Commission comprehensive policy statements on both these questions.

Second, the existing regulations interpreting the Equal Pay Act of 1963 were issued by the Department of Labor when it was responsible for enforcing the Equal Pay Act. Upon receiving that responsibility in 1979, the EEOC stated (44 FR 38671) that while it was not adopting DOL's interpretations of the Act, employers could continue to rely upon those interpretations until the EEOC issued its own, "to the extent that they are not inconsistent with statutory revisions and judicial interpretations."

Under these conditions, the existing regulations are almost useless to employers and employees because it is almost impossible for them to know which regulations the EEOC deems effective and which it considers to have been overruled. Indeed, the continued publication of those regulations in the Code of Federal Regulations is misleading because the EEOC's 1979 "proceed at your own risk" notice is not published along with the regulations. Thus, anyone not aware of that notice might understandably think that the regulations may be relied upon in their entirety.

It is therefore imperative that the existing Equal Pay Act interpretations be rescinded. It is less clear, however, whether they should be replaced by new interpretative regulations or a general statement of enforcement policy, or whether the Equal Pay Act should be left to speak for itself. The Commission's staff is now reviewing the advantages and disadvantages of the alternatives, and I intend to make a proposal to the Commission at the conclusion of that review.

SIGNIFICANT REGULATORY ACTIONS

Prerule Stage

FEDERAL AGENCIES' AFFIRMATIVE PROGRAMS OF EQUAL EMPLOYMENT OPPORTUNITY (PREVIOUSLY USED TITLE: EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT)

Problem To Be Solved

Section 717(a) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e16(a)), provides that all "personnel actions affecting employees or applicants for employment [in the Federal government] shall be made free from any discrimination based on race, color, religion, sex, or national origin." Section 717(b) of the Act, 42 U.S.C. 2000e-16(b), requires that each Federal department and agency submit to the EEOC "a national and regional equal employment opportunity plan . . . in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment."

Notwithstanding the statutory requirement that all Federal personnel actions be free from discrimination, on January 9, 1981, the EEOC issued Equal Employment Opportunity Management Directive 707 (MD-707), which requires that Federal personnel actions be based upon race, sex, and national origin. Specifically, MD-707 directed each Federal agency and department to determine whether the percentage of its employees from each race and national origin group, by sex, in each of its occupational series or employment categories, is the same as the participation rate for each race and national origin group, by sex, in the civilian labor force. Wherever any group was found to be "underrepresented," the agency or department was to set numerical "goals" for hiring and promoting members of that group, and to set aside hiring and promotion opportunities for members of such groups in order to achieve those "goals."

It is necessary to revise MD-707 in order to prevent employment discrimination by Federal agencies.

Need For Federal Solution

This Management Directive applies solely to Federal agencies and can only be revised by the EEOC.

Approach

We have identified the following questions as potential policy issues to be resolved:

1. Section 717(b) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(b), requires that every Federal agency "maintain an affirmative program of equal employment opportunity." What are proper elements for such a program?
2. Should Federal agencies set goals and timetables for hiring individuals on the basis of their race, sex, and national origin?
3. What action should the EEOC take if a Federal agency refuses to comply with a rule, regulation, order, or instruction issued by the EEOC pursuant to section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16)?

Alternative responses to these issues are still being identified.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Preparation of new Management Directive completed	September 1985
Consultation with other agencies, if Commission approves new Management Directive	October-December 1985
Issuance of new Management Directive if approved by Commission	January 1986

Agency Contact

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RIN: 3046-AA12

EQUAL PAY ACT INTERPRETATIONS

Problem To Be Solved

In 1965 the Department of Labor (DOL), which was then responsible for enforcing the Equal Pay Act of 1963, issued a set of interpretations of the Act. DOL amended its interpretations in 1967.

Between 1967 and 1979, the Fair Labor Standards Act, of which the Equal Pay Act is an integral part, was amended three times. There were also a number of court decisions, including *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), rejecting or questioning aspects of the DOL interpretations. Therefore, in 1979, when the EEOC received responsibility for enforcing the Equal Pay Act, the Commission declared (44 FR 38671) that while it was not adopting the DOL interpretations, until the EEOC issued its own interpretations employers could continue to rely upon the DOL interpretations "to the extent that they are not inconsistent with statutory revisions and judicial interpretations."

The EEOC's 1979 notice is not published in the Code of Federal Regulations with the DOL interpretations. Therefore, a person reading those interpretations might mistakenly think they may be relied upon in their entirety. Moreover, the EEOC has never indicated which provisions of the DOL interpretations it considers to be "inconsistent with statutory revisions and judicial interpretations." Thus, not even employers and employees who are aware of the 1979 notice have any reliable guidance concerning the EEOC's interpretation of their obligations and rights under the Equal Pay Act.

Need For Federal Solution

The EEOC has primary responsibility for enforcing the Equal Pay Act.

Approach

The following alternative solutions have been identified:

1. The Commission could issue new interpretative regulations. The advantages of this alternative would be that employers would have the EEOC's interpretation of the statute, the prior DOL regulations would be updated to reflect statutory changes and judicial development, and, the EEOC's interpretations would be widely disseminated and readily available to employers. Regulations would benefit the EEOC to the extent that they facilitate enforcement, employers to the extent that they facilitate voluntary compliance, and employees to the extent that compliance is more easily or quickly achieved. The regulations would not impose any costs not imposed by the statute itself.
2. The Commission could issue a statement of enforcement policy, instead of interpretative regulations. The advantage of this alternative is that employers would be apprised of the enforcement agency's interpretation. The disadvantages are that the DOL's regulations might still be in the Code of Federal Regulations and the EEOC's enforcement policy might not be as widely disseminated or readily available to employers as interpretative regulations would be.
3. The Commission could announce that the DOL regulations can no longer be relied upon without issuing anything to replace them. The advantage would be that it is the least costly alternative for the EEOC to implement. The disadvantages are that employers would not have general guidance from the enforcement agency, the agency's enforcement efforts might be slowed by case-by-case development of policy and precedent, and employees might not be aware of their rights.

New regulations would offer employers greater certainty concerning how to comply with the Equal Pay Act. Thus, they would eliminate the costs associated with the present risk of unintentional noncompliance.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Commission decision concerning whether to issue new regulations	September 1985
Publication of notice that employers may not rely upon existing regulations (if Commission decides not to issue new regulations)	November 1985
Proposed rule presented to Commission (if Commission decides to issue new regulations)	May 19

Agency Contact

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RIN: 3046 AA0

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Problem To Be Solved

The Uniform Guidelines on Employee Selection Procedures (UGESP, 29 CFR Part 1607), which were promulgated in 1978 (43 FR 38290), define "discrimination" in employment on the basis of a mechanical statistical rule that bears no relationship to the plain meaning of that term. UGESP requires (1) that whenever there are variations beyond a narrow margin in the rates at which an employer hires or promotes people of different races, sexes, or national origins, the employer must "validate" its selection procedure(s) according to certain highly technical standards; and (2) that employers maintain records of the races, sexes, and national origins of their employees and applicants for employment.

These regulations are founded on the premise that but for unlawful discrimination, there would not be variations in the rates of hire or promotion of people of different races, sexes, and national origins. UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral.

Considering the premises underlying UGESP, it is necessary to reexamine these regulations.

Need For Federal Solution

Enforcement of title VII of the Civil Rights Act of 1964, as amended, is a responsibility of the Federal government.

Approach

Among the potential policy issues to be resolved are the following:

1. Under what circumstances, if any, is it a violation of title VII if the percentage of applicants of any particular race, sex, or national origin hired by an employer is different from the percentage hired of any other race, sex, or national origin?
2. Under what circumstances, if any, and according to what standards, does title VII require that an employer demonstrate the validity of its employee selection procedures?

What records, if any, should employers be required to keep, and for how long, concerning the race, sex, and national origin of their employees, former employees, and applicants for employment?

Alternative approaches and/or solutions are still being identified.

The goal of any revision of UGESP would be to implement a more rational, effective, and efficient approach to the enforcement of title VII. Such a revision would be consistent with the Administration's regulatory principles because it would have a net benefit to society by helping to eliminate unlawful employment discrimination.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Proposed rule presented for Commission vote	February 1986

Agency Contact

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(202) 634-6700 RIN: 3046-AA25

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

Problem To Be Solved

A General Accounting Office report (GAO/FPCD-83-21, April 7, 1983) chronicled problems that were present in the system for resolving charges of unlawful discrimination filed by Federal employees or applicants for Federal employment. The EEOC has already addressed the internal management of its role in this process, but most of the problems were, and continue to be, the result of the system itself. This system's complex structure has been characterized by an inordinate length of time for processing complaints of discrimination (an average of 524 days is taken to issue final agency decisions), duplication of fact development, multiple levels of decision making, heavy involvement by respondent agencies in investigating and ruling on complaints regarding their own conduct, and inadequate mechanisms to ensure compliance with final orders issued at the completion of the process.

Need For Federal Solution

This action relates solely to employees of Federal agencies and to applicants for employment in the Federal government.

Approach

We have identified the following questions as potential policy issues to be resolved:

1. What is the most efficient process for resolving complaints of unlawful discrimination filed by Federal employees or by applicants for Federal employment?
2. What action should the EEOC take if a Federal agency refuses to comply with a final adjudication by the EEOC of a discrimination complaint filed by a Federal employee or by an applicant for Federal employment?

Alternative responses to these issues are still being identified.

This action is consistent with the Administration's regulatory principles because it will have a net benefit to society by helping to eliminate unlawful discrimination in the Federal government. In addition, it will result in more efficient and effective enforcement of the statutory prohibitions against discrimination by Federal agencies.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Proposed rule, if any, presented for Commission vote	November 1985
Publication of final rule, if any	March 1986

Agency Contact

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EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT: HANDICAP

Problem To Be Solved

The Commission is processing an increasing volume of complaints alleging handicap discrimination by Federal agencies in violation of section 501 of the Rehabilitation Act of 1973. Our review of these complaints, our communications with other Federal agencies, and the state of judicial case law on this subject matter indicate that there are at least two major issues where the Commission's existing regulations are inadequate and further guidance is necessary: (1) the appropriate definition of handicapped individuals who are protected by Federal statutes from discrimination and/or on whose behalf affirmative action is to be undertaken, and (2) the extent to which an agency must accommodate these individuals' disabilities.

The commission's regulations contain a very general definition of "handicapped person." This definition has

American
Psychological
Association

April 19, 1985

Mr. Clarence Thomas, Chair
Equal Employment Opportunity Commission
2401 E Street, NW
Suite 5
Washington, DC 20507

Dear Mr. Thomas:

We understand that the present Uniform Guidelines on Employee Selection Procedures are being reviewed, with an eye to possible revision. The latest version of the Standards for Educational and Psychological Testing, which will be published in June of 1985, will be useful in your work. The Committee on Psychological Tests and Assessment believes that although these Test Standards could help to clarify the present EEOC guidelines, the two documents are not in conflict. Therefore, we see no compelling reason for revising the EEOC Guidelines on technical grounds. However, if a revision is undertaken, we request the opportunity to provide consultation and advice on the scientific and technical aspects of the EEOC guidelines.

Sincerely,

Douglas Jackson/lc

Douglas Jackson, Ph.D., Chair
Committee on Psychological
Tests and Assessment

Sincerely,

Michael S. Pallak

Michael S. Pallak, Ph.D.
Executive Officer

bcc: Colleen Cordes
2641s

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Attachment B

Outline of Issues for the UGESP Review

I. Necessity and Purpose

  A. Should there be Guidelines?

    1. Is it appropriate or even possible to provide standardized guidance to different types of employers (*e.g.*, governmental and private employers).

    2. Could guidance be provided through the compliance manual?

    3. Through the opinion letter process?

  B. What is the purpose of the Guidelines?

    1. To summarize case law?

       if so, why is this necessary?

    2. To fill in the gaps in the court decisions?

    3. To point the user in a particular direction?

  C. Should the guidelines cover the ADEA?

II. Adverse Impact

  A. What is the basis for assuming that discrimination occurs if the selection rates vary among groups, without reference to any other difference in characteristics among the groups (*e.g.*, prior experience, or other differences in age, education etc.).

    1. Should an employer's selections be expected to mirror the pool of applicants?

    2. Is the premise underlying underrepresentation valid for some jobs and not for others, *e.g.*, for unskilled workers, but not for highly specialized professionals?

  B. Statistical approaches to proving discrimination

    a. What assumptions underly an 80% rule?

    b. What is its reliability? Does it under - or overdetect? Would a test of statistical significance be preferable?

Attachment C

C. Legal Analyses

1. Was intent shown in Griggs? If so, why was an impact analysis necessary?

2. Has the holding in Griggs been eroded by Stotts?

3. To what extent is an impact standard consistent with §1981? With the 14th Amendment? Should it be?

4. Should employers bear the burden of seeking less discriminatory procedures? Is this subject to a cost defense?

III. Test Validity

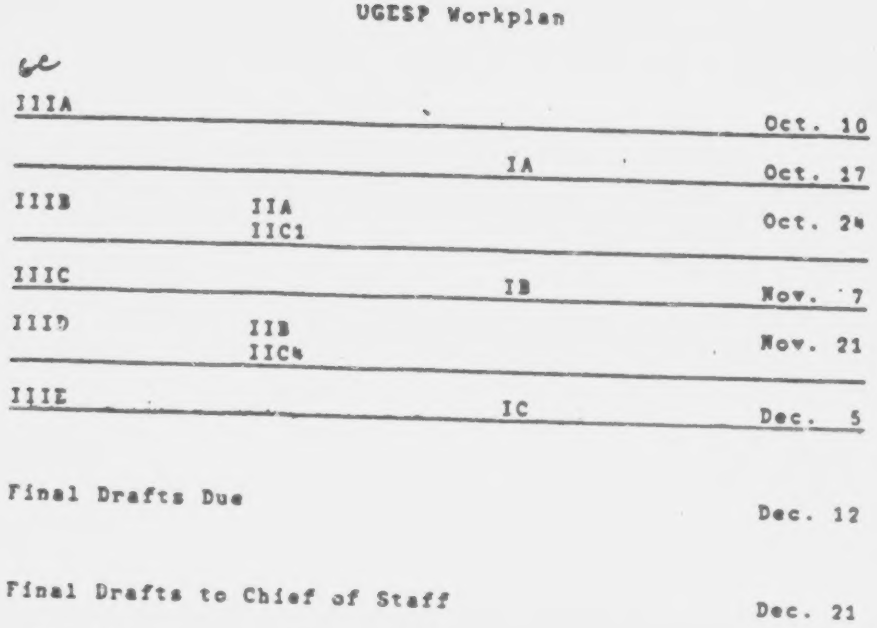
A. Should the Commission take a position on acceptable methods of test validation?

B. If so, should it adopt the standards of the APA in their entirety (Determine whether other federal agencies incorporate the standards of similar private entities into their regulations or directives)?

C. Do other professionally acceptable standards or approaches to test validation exist?

D. Can determinations of test validity be made through the use of expert testimony on a case-by-case-basis?

E. Should employers be permitted to transport evidence of validity from one user to another?



UGESP Workplan

6e

IIIA			Oct. 10
		IA	Oct. 17
IIIB	IIA IIC1		Oct. 24
IIIC		IB	Nov. 7
IIID	IIB IIC4		Nov. 21
IIIE		IC	Dec. 5
Final Drafts Due			Dec. 12
Final Drafts to Chief of Staff			Dec. 21

Mr. MARTINEZ. Thank you, Mr. Robinson.

Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman. I am conscious of the time because I have got a sneaking suspicion that the bells are going to start going crazy pretty soon and we are going to have to start voting, and I would like to hear the other panel.

I just want to know if I have got the correct consensus of the three witnesses that we have just heard. Am I correct in assuming, you are saying in effect you don't want the guidelines discarded, you recognize that there may be some need for revision, but let's not throw the baby, so to speak, out with the bath water.

And am I correct in assuming, too, you think there ought to be some consultation with other agencies before coming to a definitive decision on changes to be made? Now, as lawyers, and all three of you are lawyers——

Mr. ROBERT PATTERSON. No.

Mr. HAYES. You are not?

Mr. ROBERT PATTERSON. No.

Mr. HAYES. Well, two out of three are lawyers. Your position certainly is not predicated on the same premise that the exterminator's premise was, his conclusion was, he prayed daily—I know each of you have been processing cases, EEOC cases, on occasion—the exterminator prayed each day, and thank God for rats and roaches. Now you are not looking for business through this media. Your concern is genuine and you are trying to be supportive of what correcting wrongs should be righted. Am I correct in coming to that conclusion?

Mr. ROBINSON. Yes, Congressman Hayes, your comments express a full appreciation of the testimony and the points that I tried to make. I appreciate your summarizing them very much.

Mr. **Hayes**. All right.

Mr. **Robert Patterson**. I would concur absolutely. The one thing that I would say is if the guidelines is revised in a way that it seems as though they may, I suspect that we will have a heck of a lot more business than we have ever had before, not the opposite.

Mr. **Patrick Patterson**. I would also like to add that in addition to consultation with other agencies, we think that the process should be very much like the process of the initial adoption of the guidelines, that is, broad consultation with groups outside the government and members of the public.

Mr. **Hayes**. Thank you, Mr. Chairman.

Mr. **Martinez**. Thank you, Mr. Hayes.

Mr. Gunderson.

Mr. **Gunderson**. Thank you, Mr. Chairman, and all of you for your testimony. I have to, I guess, only repeat what I have said earlier, that I see nothing wrong with the concept of a review and I think a couple of you have indicated you see nothing wrong with the concept of a review in and of itself.

I personally, rightly or wrongly, don't normally get hung up on the process. I do get very hung up on results. And whether it be this issue or the whole Executive order on affirmative action, if the administration comes down on what I feel to be the wrong side of those things, I will be as vocal as anybody in telling them that I think they have made a major mistake, and working with the others on this committee I will try to prevent such action from becoming the law of the land.

One of the things I am amazed by is this whole question of litigation, of whether or not litigation ought to focus on individual cases or it ought to focus on systemic discrimination. I never thought, believe it or not, I would hear criticism of a Reagan administration for focusing on individual cases. I thought there would be a criticism that they weren't doing that. I find it rather unique that that kind of a criticism is being made. I don't know if any of you want to comment on that or not.

The other thing that is disturbing to me--and I don't know how to resolve it because in other instances I can get up and give an inflammatory speech on the floor, which I think my colleagues would agree, I may have done once or twice—but this isn't the kind of government or atmosphere I like. I really prefer, and I say so often, that when the elections are all said and done, whether it Democrat or Republican, the basic responsibility of all of us we have got to govern—together.

My most disturbing reaction to the hearing thus far, and especially, Mr. Robinson, to your testimony, is that I detect between you and Chairman Thomas a personality difference. I don't know how to ever get you two to work together. I sit here and say what could be done to get these two to sit down and, talk—quote, "reasonable people can differ without being disagreeable." But I fear that this wouldn't be possible. There seems to be such intense personal hatred in your statement by these accusations to the personal opinions of Chairman Thomas as opposed to the actions of the Commission. I don't know how to get you two to work together.

Mr. **Robinson**. Mr. Gunderson, let me suggest to you, as I have suggested to this committee before and other committees of this

House, on one occasion when I was defending Clarence—we do talk.

Mr. GUNDERSON. Amazing.

Mr. ROBINSON. We do talk and we, indeed, as I have said before, talk to each other to the point that we have the ability to speak with each other very sharply and still talk. Some day I hope to persuade him of my views.

Mr. GUNDERSON. Do you still stand by the statement in your testimony that the current review is nothing more than an effort to repeal existing law?

Mr. ROBINSON. Yes.

Mr. GUNDERSON. You do?

Mr. ROBINSON. I do, and I refer you back to the statement that he made in his submission to OMB saying, I will recommend changes on those two basic points. And I don't see how you can look at those two points and conclude that it is not an effort to repeal existing law.

Mr. GUNDERSON. I think it is essential, though, that we differentiate between the personal opinions of one member of the Commission, who happens to be chairman, and has every right to advocate that, as opposed to the intent of the Commission as a whole.

I just don't believe that when all is said and done, that in any way, shape, or form that the Commission's revision, if there is a revision of the uniform guidelines, will be a significant repeal of existing law.

Mr. ROBINSON. I wish we could isolate the Chairman of the Equal Employment Opportunity Commission or other important Federal agencies off as mere individuals and discount their views as meaning no more than that. But that's not so.

Throughout the history of the Equal Employment Opportunity Commission the Chairman has spoken for that agency. There's a lot of discussion now about it being a collegial body, and I guess theoretically it always was. But there's never been any question—the Chairman runs that agency. And Cliff Alexander, after he ceased to be Chairman, and Bill Brown became Chairman, can tell you that his views didn't have so much weight after Bill goes to be Chairman. That was well chronicled in the Washington Post and elsewhere. I see Congressman Hayes shaking his head, nodding in assent.

The chairman of a Federal agency, inclusive of the EEOC, when he expresses his views means more than just I am an individual chairman giving off personal views. It is understood that way by the employer community. That's why they ask the Chairman to come speak to them, not another commissioner. They want the Chairman. That's why, indeed, I suggest, I submit that you want the chairman, not just any old commissioner.

Mr. ROBERT PATTERSON. May I add one thing?

Mr. GUNDERSON. Sure.

Mr. ROBERT PATTERSON. You know, if you are an EO specialist at the EEOC, and you know that your chairman does not believe in the use of the four-fifths rule of thumb, are you going to continue using the four-fifths rule of thumb in evaluating complaints to come before you? And that is the problem. And that is, I believe, a major concern right now. Now, once if that gets clarified, and it's a decision of the Commission that they are going to continue to do something, then I don't think there will be any question in any EO specialist's mind, but I think there is a great deal right now.

I bring that up because of the fact that I think there's always question in Justice Department lawyers' minds, as indicated by that one situation I mentioned that occurred yesterday. So if the Justice Department attorneys and the EO specialists are not in fact going to do this because they both perceive that their respective ultimate bosses have a certain position, then, in fact, it has already happened, because it is being played out that way.

Mr. GUNDERSON. I have a Democratic colleague from Wisconsin who often when farmers are complaining about the Reagan farm program says, don't ask me to repeal the results of last fall's election. You guys are the ones that voted the way you did.

I sometimes think that when we get into these debates as to process, even with in the EEOC, it was very clear, not only in 1980 but in 1984, that this President doesn't believe in quotas, doesn't believe in timetables, doesn't necessarily believe in the use of statistics but he was overwhelmingly elected. I don't share all those sentiments. I think statistics can be misused but I think you have to use them.

But I think as a result of all of that, we need to be a little bit flexible in the process, but be vigilant in the result. I just encourage you very much to do that in the upcoming months as this process continues. Let's not get so hung up on the process that we do burden the Commission with nothing but details of process and never allow them to get on with the results.

I would like to have—the chairman's got a time signal here. No wonder I never look at you when I am talking. [Laughter.]

Mr. GUNDERSON. I would like to have oversight hearings to focus just on the results of the Commission much more than the process. I think that would be much more in the interest of advancement of civil rights in this country.

With that I yield back the balance of my time.

Mr. MARTINEZ. The only problem with that is that it is after the fact. You know, sometimes that's too late. You have to take precautionary measures.

I think there's a common thread that runs through all of this testimony and that seems to escape some people sometimes. I don't think that we are criticising the Reagan administration for going after and being concerned with individual discrimination. We always have to be concerned with that. But there's always been recourse for the individual, always, through civil or other actions.

The problem is that it seems like cynicism comes into the administration now in that they would rather diffuse and take the center of interest away from systemic discrimination by focusing on the individual, thereby not having to provide that relief at all. And thereby knowing that only the few will get the advantages of concern over discrimination, not the majority.

Would any of you care to reflect on that?

Mr. ROBERT PATTERSON. I suppose we all would agree with you.

Mr. ROBINSON. We would agree with you. And it's for that reason that I want to thank you and other members of this committee for being vigilant. I want to encourage you to please continue to insist that the Equal Employment Opportunity Commission develop a set of priorities that would include proper enforcment activity with respect both to individual claims of discrimination and systemic claims of discrimination.

Mr. MARTINEZ. I can assure you of that. One thing that is very apparent to me, even though it is not apparent to at least a few, that when you have a report done, a 111-page report done, and it really doesn't provide you with the bullets you need to attack the issue you want to attack, and then you have it rewritten in a form that will, but don't disclose the results.

I assure you, we are going to press for that first original 111-page report and compare that with the revisions. I think there will be a clear indication there of what actually has preceded even though there has been denials that anything has been taking place that would work towards changing those regulations.

With that, I have no other questions. I would like to thank you all for appearing before us. Your testimony is of great importance to us. Thank you.

Mr. PATRICK PATTERSON. Thank you.

Mr. ROBERT PATTERSON. Thank you.

Mr. MARTINEZ. The second panel consists of Leonard Goodstein, William Burns, and Lance Seberhagen.

Mr. SEBERHAGEN. That's right.

Mr. MARTINEZ. Mr. Goodstein is executive director of American Psychological Association. Mr. Burns is personnel relations, Pacific Gas & Electric Co. Mr. Seberhagen is Seberhagen & Associates.

Would you like to proceed, Mr. Goodstein?

STATEMENT OF LEONARD GOODSTEIN, EXECUTIVE OFFICER, AMERICAN PSYCHOLOGICAL ASSOCIATION; WILLIAM C. BURNS, DIRECTOR, PERSONNEL INFORMATION AND TECHNICAL SERVICES, PERSONNEL RELATIONS, PACIFIC GAS & ELECTRIC CO., AND LANCE W. SEBERHAGEN, SEBERHAGEN & ASSOCIATES, VIENNA, VA, A PANEL

Mr. GOODSTEIN. Thank you, Mr. Chairman and members of the committee. I am Dr. Leonard Goodstein and it has been my pleasure to assume the position of executive officer for the American Psychological Association less than a month ago.

I am pleased to be appearing before this committee to present the first of what I suspect will be many pieces of congressional testimony I will be giving over the next few years representing the 76,000 members of our association.

The subject of today's hearings, the Uniform Guidelines on Employee Selection Procedures, is of great concern to many psychologists, and I appreciate the committee's interest in APA's views on this very important issue. I'm sorry Mr. Gunderson had to leave—he questions our interest in that.

Mr. MARTINEZ. Mr. Goodstein, we have asked, because of the hour, and like Mr. Hayes has said, we are going to be getting calls here and other things taking place—would you summarize your entire testimony and it will be included in the record for all of you. We will try to hold as close as we can to the 5-minute rule but still allow you enough time to say what you have to say.

Mr. Goodstein. I will be brief.

As you know, the APA has been actively in past efforts to mold these guidelines prior to 1978 when they were adopted, and psychologists continue to be those most concerned about the implications of these regulations.

I would like to present first an overview of the issues about which there's substantial agreement within the APA membership based on our continued and unified commitment to the goal of equal employment opportunity. Then I would like to identify the issues on which there is not a consensus and the reasons why there is not such a consensus.

Let me begin with a clear statement as to our major area of agreement. We strongly stand in support of the basic goal of the guidelines to ensure fairness in hiring practice.

Our disagreements surround how to improve and strengthen those guidelines. The association would reject any attempt to weaken or drop those guidelines. The APA has a longstanding and wholehearted commitment to equal employment opportunity and to fair employment standards as a vehicle to ensure against discrimination.

Within this commitment, most psychologists would agree that properly validated tests and other selection procedures play a useful role in helping employes to choose qualified candidates, and to better match people with jobs in order to ensure the economic productivity of the work force.

On the specific issues addressed in the guidelines, you will also find that psychologists generally agree that the caliber of employment practices in organizations has dramatically improved since the publication of those guidelines in 1978, as Professor Blumrosen has indicated very clearly in his testimony this morning.

Beyond these areas of agreement, however, there is considerably less consensus among psychologists regarding the appropriate course to pursue in the near future with respect to the guidelines. There seems to be two viable options: to retain the guidelines in their present form, or to revise the guidelines to reflect recent research findings in court rulings as well as contemporary practice in the practice of psychology.

Those psychologists who feel that the uniform guidelines should be retained as they now exist, a group that includes our committee on psychological tests and assessment——

Mr. Martinez. We will finish your testimony and recess to make that vote.

Mr. Goodstein. This group, that includes our Committee on psychological tests and assessment, see no compelling reason to revise the guidelines on technical grounds because they feel that the guidelines are compatible with the recently revised Standards for Educational and Psychological Testing. These standards, the culmination of a 4-year joint effort of our association, the American Educational Research Association, and the National Council on Measurement in Education, are the professional standards for evaluating standardized tests and other selection procedures, that are the subject of the uniform guidelines. This group feels that using these new standards for educational and psychological testing to clarify the present guidelines would effectively work to continue to combat discrimination in employee selection procedures.

In addition—and this is critical, I think—the psychologists who support retaining the guidelines realize that such a revision must involve political, as well as scientific considerations, and that any attempt at revision could result in a weakening of the guidelines. It might provide a lever in which the guidelines would be weakened or vitiated.

These psychologists feel that it is not worth risking years of progress in equal employment opportunities for what they feel are relatively few changes that the guidelines may need to make this document consistent with the current state of art in psychological practice.

The psychologists who support retaining the existing guidelines also argue that the guidelines already allow for modification of their requirements, based on subsequent research findings. For example, the introduction to section 14 of the guidelines says:

> Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to the validation of selection procedures.

In addition to these policy-related issues, there are technical issues addressed by the guidelines for which there is some disagreement. These disagreements lead some psychologists to advocate the revision of the guidelines, and these include the members of division 14, our Society for Industrial and Organizational Psychology, of which I, myself, am a member.

Those psychologists who support the revising of the guidelines at this time feel that the considerable scientific progress that has been made in a number of specific areas since the guidelines were written in 1978, and that the guidelines no longer represent contemporary practice. In fact, division 14 is now involved in the updating of its own principles for the validation and use of personnel selection procedures, which was last revised in 1980, for very much the same reason.

Again, let me point out the division's motivation for revising its document, as well as for urging revisions of the guidelines, is to upgarde both of them, not to weaken or make them less relevant. To be more specific, let me just point out the four areas, all of which are spelled out in more detail in my technical testimony, which you have copies, that concern those who feel that they ought to be revised.

One is validity generalization. And that is, if you do a study in New York for computer programmers, is it necessary to do exactly the same study with the same kind of work force in San Francisco? A technical problem that has economic implications.

A second one is differential prediction. The research now clearly indicates that since 1978, there is no reason to continue to assume, as the guidelines do, that the job performance of persons in different racial groups, or between men and women, is systematically underpredicated by standardized psychological tests. Therefore, they argue, the requirement that employers conduct studies of test fairness in these different groups is simply unnecessary.

Those APA members who favor the retaining of these guidelines, make the point that the present guidelines don't require such revalidation studies and, therefore, that could be done under the present guidelines.

The psychologists who support revising the standards also have two additional ones. These have to do with job relatedness; that is, whether or not the tests can be shown to be related.

And, finally, utility analysis, which is simply a cost-benefit analysis of those practices.

The simple fact is that what divides us is whether or not it is politically appropriate at this time to open Pandora's box, or whether it is appropriate to retain those. And that's a political decision rather than a technical one. If these political concerns and fears can be found to be groundless; that is, if the guide will be sustained and increased, I personally would support revising those guidelines, in addition to those of my colleagues who presently oppose them.

Thank you very much for this opportunity.

[The prepared statement of Leonard Goodstein follows:]

Prepared Statement of Leonard Goodstein, Ph.D., Executive Officer, American Psychological Association

Mr. Chairman, members of the committee: I am Dr. Leonard Goodstein, and it has recently been my pleasure to assume the position of Executive Officer for the American Psychological Association (APA). I am pleased to be appearing before this Committee to present the first of what I know will be many pieces of Congressional testimony I will be giving over the next several years on behalf of the 76,000 members of APA.

The subject of today's hearings, the Uniform Guidelines on Employee Selection Procedures, is of great concern to many psychologists, and I appreciate the Committee's interest in APA's views on this very important issue. As you may know, APA members were actively involved in past efforts to mold these guidelines in 1978, and psychologists continue to be among those most concerned about the social, scientific, and professional implications of these regulations. I will present today an overview of the issues surrounding the Guidelines on which there is substantial agreement within the APA membership, based on our unified commitment to the goal of equal employment opportunity. I will also present those issues on which there is not a consensus among psychologists, such as whether the Guidelines should be revised at this time.

Let me begin with a clear statement on our major point. While psychologists may have differing opinions on some of the more technical issues involved in the Guidelines, we stand strongly in support of the basic goal of the Guidelines—to ensure fairness in hiring practices. Our disagreements surround how to improve and strengthen the Guidelines. We would reject any attempt to weaken or drop them. APA has had a long-standing and whole-hearted commitment to equal employment opportunity and to fair employment standards as a vehicle to ensure against discrimination. Within this commitment, most psychologists would agree that properly validated tests and other selection procedures can play a useful role in helping employers to choose qualified candidates, and that better matching of people to jobs enhances the economic productivity of a workforce. On the specific issues addressed in the Guidelines, you would also find that psychologists generally agree that the caliber of employment practices in organizations has improved dramatically since publication of the existing Uniform Guidelines in 1978.

Beyond these areas of agreement, however, there is considerably less of a consensus among psychologists regarding the appropriate course to pursue in the near future with respect to the Guidelines. There is considerable support within the APA membership for each of the following two viable options: (1) retain the Guidelines in their present form, or (2) revise the Guidelines to reflect recent research findings and court rulings.

Those psychologists who feel that the Uniform Guidelines should be retained as they now exist, a group that includes APA's Committee on Psychological tests and Assessment, see no compelling reason to revise the Guidelines on technical grounds because they feel that the Guidelines are compatible with the recently revised Standards for Educational and Psychological Testing. These Standards, the culmination of a four year joint effort of APA, the American Educational Research Association and the National Council on Measurement in Education, are professional standards for evaluating standardized tests and other selection procedures, such as those used to employment purposes. This group feels that using the new Standards for Educational and Psychological Testing to clarify the present Uniform Guidelines would effectively work to combat discrimination in employment selection procedures.

In addition, psycologists who support retaining the Guidelines realized that such a revision must involve political, as well as the scientific considerations, and could result in a weakening of the Guidelines. These psychologists feel that it is not worth risking years of progress in equal employment opportunity for what they feel are the relatively few changes the Guidelines may need to make the document consistent with state of the art employment practices.

Psychologists who support retaining the existing Guidelines also argue that the Guidelines already allow for modification of their requirements, based on subsequent research findings. The introduction to Section 14 of the Guidelines states: "Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures."

In addition to these policy-related issues, there are some technical issues addressed by the Guidelines for which there is some disagreement within APA. It is upon these technical issues that the position held by other APA members, that the Guidelines need significant revisions, is based. Psychologists advocating revision of the Guidelines include members of APA's Division 14, the Society for Industrial and Organizational Psychology. Those psychologists who support revising the Guidelines at the present time feel that considerable scientific progress has been made in a number of specific areas since the Guidelines were written, and that the Guidelines no longer represent good contemporary practice in the area of personnel selection. In fact, Division 14 is now involved in updating its own Principles for the Validation and Use of Personnel Selection Procedures, last revised in 1980, for very much the same reason.

Again, let me point out that the Division's motivation for revising its own document, as well as for urging revisions of the Guidelines, is to upgrade both, to make both more relevant, and not to weaken either. To be more specific, I would like to briefly present some of the major technical issues that divide psychologists in relation to the Guidelines:

Validity Generalization: Those psychologists who support revision argue that the Guidelines are based upon the discredited theory that the validity of a test varies across situations, and hence that a new validity test is required in each and every instance in which a given test is used. They feel that there is now good scientific evidence to indicate that for broad classes of jobs and broad classes of cognitive ability tests, the relationship between ability and performance is positive and can be generalized across settings. This would mean that in many cases it would be unnecessary to conduct new validity studies each time an ability measure is to used as a basis for making hiring decisions.

Those who favor retaining the present Guidelines would counter that in the case of validity generalization, the Guidelines permit employers to rely on criterion-related validity evidence from other sources, that is, "studies conducted by one test user, or described in test manuals and other professional literature", as long as the following three requirements are met: (1) The validity evidence must satisfy the requirements of Section 14B of the Uniform Guidelines; (2) jobs in the two situations must be similar, as indicated by a job analysis; and (3) there must be evidence of test fairness for the groups for whom the test is intended.

Differential Prediction: The psychologists who support revision of the Guidelines contend that scientific literature since the Guidelines were published in 1978 indicates that there is no reason to continue to assume, as the Guidelines do, that the job performance of persons in different racial subgroups is systematically underpredicted by cognitive ability tests. Therefore, they argue, the requirement that employers conduct studies of "test fairness" for these groups is unnecessary. These psychologists feel that not only is there no evidence for differential prediction, but in each situation it is typically not feasible to make such an evaluation because of small sample sizes.

These psychologists cite the National Academy of Sciences report on ability testing to support their position:

The Committee has no evidence of alternatives to testing that are equally informative, equally adequate technically, and also economically and politically viable, . . . and little evidence that well-constructed and competently administered tests are more valid predictors for a population subgroup than for another: individuals with higher scores tend to perform better on the job regardless of group identity (National Academy of Sciences, 1982, p. 144).

Those APA members who favor retaining the Guidelines make the point that the present Guidelines do not require that fairness studies be done under all circumstances. The Guidelines specifically state that, "Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue."

Psychologists who support revising the guidelines also feel that there are other specific "technical" areas that are inadequately discussed in the guidelines, and that need to be updated substantially to reflect recent scientific progress in personnel selection procedures:

Validity Requirements: This issue relates to ways in which employers may demonstrate the job relatedness of their selection procedures. The guidelines suggest three strategies for assessing job relatedness: (1) criterion-related validity, where a selection procedure is justified by a statistical relationship between scores on a test or other selection procedure and measures of job performance; (2) content validity, where a selection procedure is justified by showing that it representatively samples significant parts of a job, such as a typing test for a typist; and (3) construct validity, which involves identifying the psychological trait, or the construct, which underlies successful performance on the job and then devising a selection procedure to measure the presence and degree of the construct, for example a test of leadership ability.

If a selection procedure focuses on work products, contnt validity is an appropriate strategy; however, if the focus is on work processes, then content validity is inappropriate. Advocates of revision argue that even work products like "memory" are determined by work processes, such as "answers to questions." If we talk about processes, the Uniform Guidelines automatically interpret them as constructs, and therefore content validity is inappropriate. Yet, whenever employers attempt to measure charactertistics such as judgement, stamina, or reading comprhensive, they make inferences to mental processes. In practice, job sample tests are simply not feasible for many entry-level jobs, and they are often economically infeasible for higher-level jobs.

Finally, a user is left with a construct validity strategy to demonstrate the job relatedness of a selection procedure. But the Uniform Guidelines state in Section 14D(1):

"The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion-related validity studies and which may include content validity studies."

I noted ealier that for most employers, criterion-related validity studies are technically infeasible. This also makes construct validity studies technically infeasible. Advocates of revision argue that the net result is that there is no way for an employer to comply with the validation requirements of the Uniform Guidelines—every approach is successively ruled out.

To some extent, I have already touched upon the next argument advanced by advocates of revision—that employers find themselves in a "Catch-22" situation with respect to construct validity. That is, ad defined in the Uniform Guidelines, criterion-related validity is a less demanding strategy that is construct validity. Hence, if at all possible, employers will seek to conduct criterion-related validity studis. The only reason why they might seek to do a construct validity study is because no other alternative is feasible. Yet the Uniform Guidelines note that a criterion-related validity study is a necessary part of a construct validity study. But if the criterion-related study is infeasible, then a construct validity study cannot be done either. Advocates of revision argue that a much more careful definition of construct validity is required in order for this strategy to be a meaningful alternative to employers.

Utility Analysis: Advocates of revision argue that the Uniform Guidelines do not address the issue of economic utility analysis. They state that scientific literature now suggests that considerable financial benefits can accrue to organizations that employ competently developed employee selection procedures. They feel that the guidelines should discuss this scientific literature and the procedures for conducting economic utility analyses, as productivity in the workplace is of major concern in this country.

As you can see, there are several issues for which APA members have differences of opinion as to what the appropriate course should be for the guidelines at the present time. But, whatever the decision of the EEOC on the revision of the guidelines, APA members will continue to be actively involved on this issue and to offer our considerable expertise on the scientific aspects of the guidelines.

Thant you for the opportunity to testify on the guidelines. I would b happy to answer any questions you may have at this time.

Mr. MARTINEZ. Thank you, Mr. Goodstein.

With that, we are going to adjourn. We will be back in about 10 minutes.

[Recess.]

Mr. MARTINEZ. I understand Mr. Goodstein has to leave. Just before you leave, quickly, at the end of your testimony you referred to political reasons for opening this. I really don't think there should be any political reasons for opening this question.

You stated in your testimony that it already allowed for modifications, so if there has to be a modification, or a cleaning up of things because of changing times and different philosophies——

Mr. GOODSTEIN. Yes.

Mr. MARTINEZ [continuing]. Coming into play, and more technical information being available for different aspects of this, it is already allowed. Wouldn't you suggest that the only reason for then opening up the whole can of worms is just to weaken it?

Mr. GOODSTEIN. We would certainly be opposed to that. I am quite in agreement with the consensus of the prior panel, and that is, there is a need for fine tuning. The question is: Can the Commission fine tune those within the present guidelines or should there be a revised set of guidelines? Obviously, that, regardless of which route they choose to follow, the imperative is that the revision not weaken those guidelines in any way. That would be contrary to the opinion of any psychologist who has been represented in this process of preparing and delivering testimony today, and of the position of the association.

Mr. MARTINEZ. My question is, is that for the fine tuning that they have to do, doesn't the process already allow for that modification——

Mr. GOODSTEIN. That is correct, Mr. Chairman.

I might indicate, by the way, in our effort to try to resolve some of these issues, our staff has called a meeting for Friday and invited the staff officers from EEOC to come to kind of talk that through. But this is coming at our initiative, not at theirs.

Mr. MARTINEZ. Thank you.

If you need to leave, we understand.

Mr. GOODSTEIN. Thank you very much.

Mr. MARTINEZ. With that we will turn to Dr. Burns. Proceed.

STATEMENT OF WILLIAM C. BURNS

Mr. BURNS. Thank you very much.

Mr. Chairman, members of the subcommittee, you, of course, have heard the phrase, "If it isn't broken, don't fix it."

I think this applies to the uniform guidelines because I am concerned about the public statements that have been made by those people who say they are going to do the fixing. The assertions by Chairman Thomas, both in these hearings and in the OMB document, about the premises that underlie the present guidelines are wrong. If his purpose in opening the guidelines for revision is to destroy their effectiveness, I would recommend that they remain as they are.

If they are to be revised in order to bring them into better conformity with present professional thinking as embodied in the 1985 American Psychological Association standards on testing, then I would support a revision.

I would like to discuss my views of the premises underlying the guidelines since, as far as I am concerned, the intent and purpose of the guidelines is far more important than is their technical detail. I might add that I first began working on testing guidelines in 1965 as a member of the technical advisory committee on testing to the California FEPC, and I have participated in various ways in the drafting of several sets of guidelines since then, including the present uniform guidelines.

I would like to use that experience to comment on a couple of points made by Congressman Gunderson.

First, I would agree that it's the result, not the process. But as the chairman of the California Advisory Committee, when we drafted the California guidelines that were published in 1972, I can guarantee that that process influenced the result. We went through 15 drafts, and each draft was put out for people to reflect on. People would make comments and then we would try and change the draft reflecting one set of comments, and then, lo and behold, that would uncover something else. It was that back and forth over 15 drafts that made the final result a much, much better product than had we tried to adopt the process of only producing one proposed set, taking all the comments at one time and then having the next set be final.

So I would agree it's the result that's important, but in a complex, technical, arcane area such as guidelines, the process can influence the result very dramatically.

Also, as chairman of that drafting committee, I can, by personal experience, guarantee that the personal views of the chairman do affect the outcome. The people in control of the process, as I was in control of that process, are able to influence the outcome. And I will make no bones about the fact that I was able to influence the outcome of the 1972 guidelines because I was in charge of the drafting.

I must add that I am appearing today based on my professional background and not as an official spokesman of the Pacific Gas & Electric Co.

The need for guidelines comes directly, of course, from the Tower amendment to the Civil Rights Act which protected testing and was seen by some recalcitrant Southern employers as a loophole in title VII; and in some ways it was.

To understand why, we must try to imagine how different American blacks would be today if all forms of prejudice, segregation, discrimination, and denial had disappeared 100 years ago. To say that blacks have been harmed, impeded, and injured in many ways by the obstacles placed in their path is not saying that they are inferior.

When Chairman Thomas says that it is, he is either saying that blacks today are in no way suffering any present effects of past discrimination, or else he is saying that if they are, then the responsibility for dealing with those present effects falls to blacks and to blacks alone. Of course, I am limiting my discussion to blacks only because of the time available. I am sure there are others who could comment on the equivalent problems in other minority groups.

Tests can be thought of as measures of intellectual development which can be impacted by a vast numbers of factors. Segregation and discrimination have been tragically effective in diminishing the intellectual and educational opportunities available to American blacks. Thus, tests can turn out to be tools used to bring the expected and predictable effects of past discrimination into the present.

There are many blacks, of course, who have overcome the obstacles and been able to develop their intellectual potential. But group differences are based on averages, and on the average, the group with the most opportunity does the best. If you are going to have a race, you don't want to have one group starting 40 yards behind another group, because it's going to impact the results.

It is interesting, for example, to speculate on some of the other well-documented group differences in average mental ability test scores:

Midwestern whites score higher than Southern whites.

Blacks in the West score much higher than blacks in the South.

Now, obviously these are not racial differences, they are not cultural bias in the tests, they are bias in the cultures.

The present black-white group differences in test scores will eventually go away. In fact, fortunately, they are already in the process of going away. During the 1970's, the differences between black and white children in mental-ability tests scores were almost cut in half. The documentation for this is part of my written submission.

When the differences do go away completely, then we can scrap the guidelines completely. But we are only halfway there, so I think it's too soon to throw out tools such as the guidelines that we have been trying to use to eliminate the predictable after-effects of past discrimination.

It is very important to remember that all the guidelines are doing is to require that an employer demonstrate that his tests are true standards and not irrelevant standards; that they are valid and not arbitrary. The intent is to insure that if the black-white test differences that do exist result in a smaller percentage of blacks being hired then there is in fact a real difference in the qualifications for the job. And that's all they are trying to do.

Those are the premises underlying the guidelines as I see them. I regard an acceptance and understanding of these premises as a prerequisite to my revision. That does not mean I feel the guidelines are perfect. The 1985 APA standards represent a more up-to-date statement of several issues than do the guidelines, but I won't go into any of the technical issues.

The critical issues are: Why is a revision needed? And what are the purposes and goals that the guidelines will serve?

Employee selection guidelines are difficult to write. They combine arcane, complex, technical details, with emotions, vested interests, and conflicting value systems. It would be very easy to write a much worse set of guidelines than the ones that we have now.

So what I would recommend is let's be sure that we don't break something that we set out to fix.

Thank you.

Mr. MARTINEZ. Thank you, Dr. Burns.

[The prepared statement of William C. Burns follows:]

Prepared Statement of William C. Burns, Director, Personnel Information and Technical Services, Pacific Gas and Electric Co.

You've heard the phrase, "if it isn't broken, don't fix it." I think that this advice applies to the Uniform Guidelines on Employee Selection Procedures at the present time. I am concerned by the public statements of those who say that they are going to do the fixing. The statements by Chairman Thomas about the premises that underlie the Guidelines are wrong at best. If his purpose in opening the Guidelines for revision is to destroy them, then I would recommend that they remain as they are. If they are to be revised in order to bring them into better conformity with present professional thinking as embodied in the 1985 American Psychological Association standards on testing, then I would support a revision.

Let me first discuss my view of the premises underlying the Guidelines since the intent and purpose of the Guidelines is far more important than their technical detail. I might add that I first began working on testing guidelines in 1965 as a member of the Technical Advisory Committee on Testing to the California Fair Employment Practice Commission and have participated in various ways in the drafting of several sets of guidelines since then, including the present Uniform Guidelines.

The need for guidelines comes directly from the Tower amendment to the Civil Rights Act of 1964 which "protected" testing and was seen by some recalcitrant Southern employers as the "loophole" in Title 7. And in some ways, it was.

To understand why, try to imagine how different American Blacks would be today if all forms of prejudice, segregation, and discrimination had disappeared a hundred years ago. To say that blacks have been harmed, impeded, and injured in many ways by the obstacles placed in their path is not saying that they are "inferior". When Chairman Thomas says that it is, he is either saying that blacks today are in no way suffering any present effects of past discrimination, or, he is saying that if they are, then the responsibility for dealing with those present effects falls to blacks and to blacks alone. (I am limiting my discussion to blacks only because of the time available to me.)

The testing program challenged in the Griggs case became effective on July 2, 1965, the very same day as the Civil Rights Act of 1964. Tests can be thought of as measures of intellectual development which can be impacted by vast numbers of factors. Segregation and discrimination have been tragically effective in diminishing the intellectual and educational opportunities of American Blacks. Thus, tests can be tools used to bring the expected and predictable effects of past discrimination into the present. There are many blacks, of course, who have overcome the obstacles and been able to develop their potential. But group differences are based on averages, and on the average, the group with the most opportunity does the best.

It is interesting, for example, to speculate on the following well-documented group differences in average mental-ability test scores:

1. Midwestern whites score higher than Southern whites.

2. Blacks in the West score much higher than blacks in the South.

The present black-white group differences in test scores will eventually go away. In fact they are already in the process of going away. During the 1970s the differences between black and white children were almost cut in half. (The documentation supporting this clear indication of progress is part of my written submission to the subcommittee.) When the differences do go away completely, we can then scrap the Guidelines completely. We are only half-way there so I think it is too soon to throw out tools, such as the Guidelines, that we have been using to try to eliminate the after-effects of discrimination.

It is important to remember that the Guidelines only require that an employer demonstrate that his tests are true standards and not irrelevant standards - that they are valid and not arbitrary. The intent is to insure that if black-white test differences result in a smaller percentage of blacks being hired then there is a real difference in qualifications for the job.

Those are the premises underlying the Guidelines as I see them. I regard an acceptance and understanding of these premises as a prerequisite to any revision. Therefore, I recommend that no revision take place under Chairman Thomas's direction.

That does not mean that I feel that the Guidelines are perfect. The A.P.A. Standards represent a more up-to-date statement of several issues than do the Guidelines. I would like to briefly comment on only one of those issues - validity generalization.

Validity generalization is a type of meta-analysis. Meta-analysis is simply an attempt to take the data reported in several studies and to try to combine it into a single giant study. It is a statistical analysis of the numerical results of a group of similar studies. The key element is that the analysis is quantitative rather than judgmental.

When this is possible, the result is much more reliable than is any small single study. Thus, validity generalization is a meta-analysis of the validity coefficients from several studies of the same job. It is an important development in employee selection research and it is also the biggest fad in the field today. It is seen by some as the snake oil that will solve all of their problems in justifying the use of any and all tests in any and all situations. Probably the most difficult task that we will face if the Guidelines are revised is to assure that validity generalization is included in a responsible and realistic way. I have submitted three journal articles which demonstrate some of the problems and issues connected with meta-analysis in general and validity generalization in particular. One of them includes fourteen standards by which meta-analytic studies can be judged. These or similar standards could be used in the Guidelines to prevent the abuse of validity generalization.

Validity generalization also serves to illustrate how important it is that any revision of the Guidelines be directed by responsible and realistic people. The public statements that have been made by Chairman Thomas raise serious doubts concerning his adequacy for the task.

APPENDIX

Attached are the following:

1. "Who gets the Jobs?" Challenging Tests as a Barrier to Equal Employment Opportunity.

   This is an extended version of the arguments presented in the statement.

2. White-Black Achievement Differences: The Narrowing Gap by Lyle V. Jones

   The first part of this paper documents the dramatic reduction in black-white test score differences that occured in children during the 70's.

3. R. J. Bullock and David J. Svyantek, "Analyzing Meta-Analysis: Potential Problems, an Unsuccessful Replication, and Evaluation Criteria" 70 Journal of Applied Psychology 108 (1985).

4. Robert G. Orwin and David S. Cordray, "Effects of Deficient Reporting on Meta-Analysis: A Conceptual Framework and Reanalysis", 97 Psychological Bulletin 134 (1985)

5. Jen A. Algera, Paul G.W. Jansen, Robert A. Roe, and Pieter Vijin, "Validity Generalization: Some critical Remarks on the Schmidt-Hunter Procedure", 57 Journal of Occupational Psychology 197 (1974) (Great Britain).

   These three papers are included to demonstrate that the inclusion of meta-analysis (validity generalization) in the UGESP is not going to be easy. The 14 standards referred to in the paper are in the Bullock and Svyantek paper.

6. A Personal Biography.

"WHO GETS THE JOBS?" CHALLENGING TESTS AS A BARRIER TO EQUAL EMPLOYMENT OPPORTUNITY

BY: WILLIAM C. BURNS

I WOULD LIKE TO BRIEFLY DISCUSS WHY TESTS CAN BE A BARRIER TO EQUAL EMPLOYMENT OPPORTUNITY, WHY CHALLENGING TESTS IS NECESSARY, AND ALSO TO OUTLINE SOME OF THE MAJOR EVENTS IN THE HISTORY OF THAT CHALLENGE.

LET ME BEGIN WITH THE HISTORY OF THE CHALLENGE.

IT IS LACED WITH IRONY AND IT HAS SPAWNED SOME MISCONCEPTIONS WHICH ARE HARD TO CORRECT.

THE FIRST IMPORTANT EVENT WAS THE SO-CALLED "MOTOROLA CASE" IN 1964 IN WHICH THE ILLINOIS FEPC RULLED THAT AN EMPLOYMENT TEST WAS BY ITSELF DISCRIMINATORY.

THIS RULING MEANT THAT EMPLOYMENT TESTING AS A PROCEDURE WAS VIRTUALLY ILLEGAL UNDER THE ILLINOIS ACT.

THE FEPC RULING WAS THROWN OUT BY THE COURTS.

THE IRONY IS THAT THE INDUSTRIAL PSYCHOLOGIST WHO WORKED WITH THE FEPC ON THE CASE WAS CONVINCED THAT MYART, THE BLACK APPLICANT, ACTUALLY PASSED THE TEST, BUT WAS TOLD THAT HE FAILED.

THIS WAS SIMPLY AN ACT OF OVERT RACIAL DISCRIMINATION BY THE EMPLOYER.

An address given at the Civil Rights Institute, sponsored by the NAACP Legal Defense and Educational Fund, Inc. May 13, 1981 New York, N.Y.

FIRST OF ALL, THE EMPLOYER SAID THE TEST WAS "LOST" SO THE SCORE COULD NOT BE CHECKED.

ALSO, MYART DID VERY WELL ON OTHER SIMILAR TESTS.

APPARENTLY, THE EMPLOYER DECIDED THAT TELLING BLACKS THAT THEY FAILED THE TEST, WHETHER THEY DID OR NOT, WAS SIMPLY AN EFFICIENT WAY TO GET THEM OUT OF THE EMPLOYMENT OFFICE.

REACTIONS TO THE CONTROVERSY GENERATED BY THE "MOTOROLA CASE" LED DIRECTLY TO THE SO-CALLED TOWER AMENDMENT WHICH WAS ADDED TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 TO "PROTECT" TESTING BY PROVIDING THAT ANY PROFESSIONALLY-DEVELOPED TEST THAT IS NOT USED TO DISCRIMINATE IS NOT A VIOLATION OF THE ACT.

STATEMENTS AT THAT TIME BY HUBERT HUMPHREY AND OTHER SENATORS "GUARANTEED" THAT WHAT HAS HAPPENED SINCE THEN COULD NOT POSSIBLY EVER HAPPEN.

THUS, THE "LEGISLATIVE INTENT" OF THE TOWER AMENDMENT HAS BEEN COMPLETELY REVERSED BY THE COURTS.

THE TOWER AMENDMENT IS NOW USED AS THE PRINCIPLE JUSTIFICATION FOR ATTACKING EMPLOYMENT TESTS.

HOWEVER, THIS REVERSAL HAD TO HAPPEN OR TITLE VII WOULD HAVE BEEN HOPELESSLY GUTTED.

THE REASON IS THAT THE TOWER AMENDMENT WAS SEEN BY RECALCITRANT EMPLOYERS, PARTICULARLY IN THE SOUTH, AS THE LOOPHOLE IN TITLE VII.

AND IT WAS.

TESTS CANNOT BE USED TO MAINTAIN COMPLETE SEGREGATION, BUT, IF THEY ARE USED IN CERTAIN WAYS, THEY CAN COME FRIGHTENINGLY CLOSE.

IN THE GRIGGS CASE, WHICH WAS THE CRUICAL SUPREME COURT DECISION IN REVERSING THE EFFECT OF THE TOWER AMENDMENT, THE DEFENDANT-EMPLOYER'S TESTING PROGRAM BECAME EFFECTIVE ON JULY 2, 1965.

JULY 2, 1965, WAS ALSO THE DAY THAT TITLE VII OF THE CIVIL RIGHTS ACT BECAME EFFECTIVE.

IT WAS ALMOST AS IF THE COMPANY WANTED EVERYONE TO KNOW THAT THEY WEREN'T ABOUT TO INTEGRATE WITHOUT A FIGHT--AND TESTS WERE THE WEAPONS THEY CHOSE TO WAGE THEIR FIGHT.

THUS, IT BECAME ABSOLUTELY NECESSARY FOR THE COURTS TO EITHER SUBVERT THE TOWER AMENDMENT OR TO ACCEPT A FATALLY WEAKENED CIVIL RIGHTS ACT.

THE NEXT QUESTION THEN IS:

WHY IS IT THAT TESTS CAN BE USED AS A TOOL TO AID A RECALCITRANT EMPLOYER WHO WISHES TO MAINTAIN SEGREGATION?

THIS QUESTION IS THE ONE THAT PRODUCES THE EMOTIONAL FLOOD THAT WASHES REASON AWAY.

ONCE AGAIN IT IS HELPFUL TO USE THE HISTORICAL APPROACH.

STARTING AS LONG AGO AS THE 1920'S, RACISTS HAVE USED DIFFERENCES IN TEST SCORES BETWEEN RACIAL, ETHNIC, AND NATIONAL ORIGIN GROUPS TO SUPPORT ARGUMENTS THAT ONE GROUP WAS "GENETICALLY" INFERIOR TO ANOTHER.

THIS CONTENTION RETURNED TO PROMINENCE IN THE 1960'S THROUGH THE WRITINGS OF SHUEY, SHOCKLEY, AND JENSEN.

THIS WAS, OF COURSE, COINCIDENT WITH THE GREAT INCREASE IN CIVIL RIGHTS ACTIVISM BY BLACKS, AND, IN MY OPINION, WAS PROBABLY CAUSED BY IT.

ONCE AGAIN TESTING WAS BEING USED AS A TOOL BY THE "BAD GUYS."

AT THIS POINT A VERY UNFORTUNATE THING HAPPENED.

IN THEIR ATTEMPTS TO "EXPLAIN AWAY" TEST SCORE DIFFERENCES BETWEEN BLACKS AND WHITES, THE PEOPLE WHO DEBATED THE RACISTS CAME UP WITH THE "CULTURAL BIAS" THEORY, WHICH IN EFFECT BLAMED THE TESTS FOR THE DIFFERENCES.

THESE DEBATES BEGAN ABOUT 15 YEARS AGO.

WE NOW HAVE SOME GOOD, RELEVANT RESEARCH THAT WE DID NOT HAVE AT THAT TIME.

I'VE FOLLOWED THIS RESEARCH AND, IN MY OPINION, BOTH THE GENETIC DIFFERENCE THEORY AND THE "CULTURAL BIAS" THEORY ARE WRONG.

THE VILLAIN IS NEITHER GENETIC DISPARITY NOR THE TESTS THEMSELVES.

THE VILLAIN IS RACISM.

PREJUDICE, SEGREGATION, AND DISCRIMINATION ARE THE VILLAINS.

TESTS ARE THE MESSENGERS THAT BRING THE BAD NEWS.

THE BAD NEWS IS THAT BLACKS HAVE BEEN HURT BY 300 YEARS OF SEPARATION AND DENIAL.

ACTUALLY, IN MANY WAYS IT IS TRULY SURPRISING THAT THE TESTS DON'T RECORD AN EVEN GREATER DIFFERENCE THAN THEY DO, GIVEN THE GREAT DISPARITIES BETWEEN BLACKS AND WHITES IN THEIR OPPORTUNITIES FOR INTELLECTUAL DEVELOPMENT.

THE PROBLEM IS NOT CULTURAL BIAS IN TESTING, IT IS BIAS IN THE CULTURE--BIAS IN ACCESS TO THE EXPERIENCES THAT LEAD TO THE FULL INTELLECTUAL DEVELOPMENT OF AN INDIVIDUAL.

IF I WERE TO ADMINISTER A BATTERY OF MENTAL ABILITY TESTS TO ALL THE NEW-BORN BABIES NOW IN THE MATERNITY WARDS OF NEW YORK HOSPITALS, THEY WOULD ALL GET THE SAME SCORE--ZERO!

SO MUCH FOR MEASURES OF "INNATE INTELLIGENCE."

WE ALL EVALUATE EACH OTHER'S MENTAL ABILITIES IN ONE WAY OR ANOTHER AND WE ALWAYS WILL.

BUT WHATEVER SYSTEM WE USE, WE ALL EVALUATE THE COMPLEX PRODUCTS OF A LIFETIME OF LEARNING AND EXPERIENCE.

THERE MUST BE AT LEAST 10,000 VARIABLES THAT CAN AFFECT THE INTELLECTUAL DEVELOPMENT THAT OCCURS BETWEEN BIRTH AND ADULTHOOD.

TO ME THE REAL TRAGEDY IS NOT THAT DISCRIMINATION IS IMMORAL, OR UNJUST, OR ILLEGAL--THE TRAGEDY IS THAT IT IS EFFECTIVE.

THE TRAGEDY IS THAT IT INJURES AND DIMINISHES THE SAME PEOPLE WHO SUFFER THE INJUSTICE.

THERE ARE MANY BLACKS, OF COURSE, WHO HAVE BEEN ABLE TO DEVELOP THEIR INTELLECTUAL POTENTIAL BECAUSE THEY HAVE BEEN ABLE TO OVERCOME THE OBSTACLES PUT IN THEIR WAY.

BUT GROUP DIFFERENCES ARE BASED ON AVERAGES, AND ON THE AVERAGE THE GROUP WITH THE FEWEST OBSTACLES DOES THE BEST.

AS AN EXAMPLE, I INVITE YOU TO SPECULATE ON THE REASONS FOR THE FOLLOWING GROUP DIFFERENCES IN MENTAL-ABILITY TEST SCORES.

MIDWESTERN WHITES, ON THE AVERAGE, SCORE HIGHER THAN SOUTHERN WHITES.

BLACKS IN THE WEST, ON THE AVERAGE, SCORE MUCH HIGHER THAN BLACKS IN THE SOUTH.

GENETIC DISPARITY?

NOT LIKELY.

CULTURAL BIAS?

POSSIBLE, BUT NOT LIKELY.

THE BLACK-WHITE GROUP DIFFERENCES WILL EVENTUALLY GO AWAY.

IN FACT, THEY ARE ALREADY IN THE PROCESS OF GOING AWAY.

A RECENT STUDY BY THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, WHEN COMPARED WITH AN EQUIVALENT STUDY DONE ABOUT TEN YEARS AGO, SHOWS THAT THE BLACK-WHITE DIFFERENCES IN THE TEST SCORES USED IN THE STUDY HAVE NARROWED FOR ALL THREE OF THEIR AGE SAMPLES, WHICH ARE 9-, 13-, AND 17-YEAR-OLD CHILDREN.

IN FACT, THE YOUNGER CHILDREN SHOW THE GREATEST IMPROVEMENT.

THE BLACK-WHITE DIFFERENCE FOR THE NINE-YEAR OLDS HAS ALMOST BEEN CUT IN HALF DURING A SINGLE DECADE.

HOWEVER, UNTIL THE BLACK-WHITE DIFFERENCES DO GO AWAY COMPLETELY, TESTING, AS A PROCESS, SERVES AS A WAY TO BRING THE EFFECTS OF PAST DISCRIMINATION INTO THE PRESENT AND CAN THUS SERVE AS A TOOL TO DELAY THE DAY WHEN EQUAL OPPORTUNITY IS MATCHED BY EQUAL RESULTS.

I HOPE THAT IT IS NOW CLEAR WHY CHALLENGING TESTS IS SO IMPORTANT.

WE CANNOT ALLOW THE EFFECTS OF PAST INJURY TO BECOME THE BASIS FOR PRESENT INJURY.

HOW DOES ALL THIS RELATE TO THE DEVELOPMENT OF AN OVERALL POLICY ON THE USE OF TESTS AS AN EMPLOYMENT PROCEDURE?

UNFORTUNATELY, THE KEY ISSUES WHICH MUST BE RESOLVED TO ANSWER THAT QUESTION ARE BOTH HIGHLY TECHNICAL AND EXTREMELY COMPLEX.

I'LL SUMMARIZE MY CONCLUSIONS AS FOLLOWS:

FIRST, TESTS ARE VALID ENOUGH AND ARE USEFUL ENOUGH TO PREVENT THE CONCLUSION THAT THEY SHOULD NOT BE USED AT ALL.

AND SECOND, TESTS ARE NOT VALID ENOUGH AND ARE NOT USEFUL ENOUGH TO JUSTIFY THEIR USE WITHOUT CAREFUL SCRUTINY.

IN OTHER WORDS, IN MY VIEW, A GENERAL BLANKET POLICY FOR OR AGAINST TESTING IS NOT APPROPRIATE.

TESTS ARE A TOOL--A NEUTRAL TOOL.

THEY HAVE SPECIFIABLE CHARACTERISTICS AND THEY HAVE SPECIFIABLE EFFECTS.

THEY ARE NOT "GOOD" AND THEY ARE NOT "EVIL."

MOST PEOPLE FOCUS ON THE TEST, BUT THE MOST CRUCIAL FACTOR IS USUALLY THE WAY THAT A TEST IS USED.

IN ORDER TO PROVIDE SOME BALANCE TO ALL THE NEGATIVE EFFECTS THAT I'VE MENTIONED SO FAR, LET ME BRIEFLY SUMMARIZE SOME OF THE WAYS THAT TESTING CAN BE USED AS AN EFFECTIVE, POSITIVE COMPONENT OF AN AFFIRMATIVE ACTION PROGRAM.

IN FACT, IF TESTS ARE USED PROPERLY, THEY CAN CONTRIBUTE GREATLY TO THE SUCCESS OF AFFIRMATIVE ACTION.

IN EVALUATING THE EFFECTS OF A TESTING PROGRAM WITHIN A POLICY OF AFFIRMATIVE ACTION, THERE ARE TWO DECISIONS WHICH WILL HAVE THE MOST IMPACT.

THE FIRST IS THE SETTING OF THE CUTOFF SCORE AND THE SECOND IS HOW STRICTLY THE CUTOFF SCORE IS USED.

THIS DISCUSSION ASSUMES THAT THE TEST INVOLVED HAS BEEN SHOWN TO BE A VALID PREDICTOR OF ACTUAL ON-THE-JOB PERFORMANCE.

IN OTHER WORDS, THAT IT IS A GENUINE MEASURE OF AN INDIVIDUAL'S QUALIFICATIONS FOR THE JOB, FOR IF IT IS NOT VALID, THEN IT SHOULD NOT BE USED FOR ANY PURPOSE AT ALL.

THE SETTING OF THE CUTOFF SCORE DEPENDS ON THE PURPOSE FOR WHICH THE TEST IS USED.

FOR EXAMPLE, A HIGH CUTOFF MAY BE USED TO SELECT A FEW INDIVIDUALS WITH VERY HIGH ABILITY LEVELS FROM A LARGE NUMBER OF CANDIDATES.

OR A MUCH LOWER CUTOFF COULD BE USED TO SCREEN OUT THOSE CANDIDATES WHOSE ABILITY LEVELS ARE SO LOW THAT THEY COULD NOT BE EXPECTED TO ADEQUATELY PERFORM THE JOB, SO THAT THOSE REMAINING COULD THEN BE EVALUATED ON INTEREST, MOTIVATION, OR OTHER FACTORS.

THE EFFECTS ON THE AMOUNT OF ADVERSE IMPACT AGAINST BLACKS OF SETTING A HIGH OR LOW CUTOFF ARE VERY GREAT, PARTICULARLY WHEN USING MENTAL ABILITY TESTS.

MOST PEOPLE ATTRIBUTE THE ADVERSE IMPACT OF A TEST TO THE TEST ITSELF, WHEN IN MANY SITUATIONS IT MAY BE MAINLY A RESULT OF A PASSING SCORE THAT HAS BEEN SET WAY TOO HIGH.

FOR EXAMPLE, ON ONE RATHER TYPICAL EMPLOYMENT TEST, AS THE CUTOFF SCORE MOVES FROM VERY LOW TO VERY HIGH, THE RATIO OF THE BLACK PASSING RATE TO THE WHITE PASSING RATE MOVES FROM 86 PERCENT DOWN TO 6 PERCENT.

A BLACK PASSING RATE THAT IS 86 PERCENT OF THE WHITE PASSING RATE REPRESENTS A SMALL ADVERSE EFFECT.

HOWEVER, A BLACK PASSING RATE THAT IS ONLY SIX PERCENT OF THE WHITE PASSING RATE REPRESENTS A VERY DAMAGING ADVERSE IMPACT.

AS YOU CAN SEE, IT IS RIDICULOUS TO TALK ABOUT HOW MUCH ADVERSE IMPACT A TEST HAS WITHOUT SPECIFYING WHETHER IT IS BEING USED WITH A HIGH OR A LOW CUTOFF SCORE.

THIS RELATIONSHIP BETWEEN CUTOFF SCORE AND AMOUNT OF ADVERSE IMPACT ALSO DEMONSTRATES WHY RANKING CANDIDATES BY TEST SCORE IS SO DAMAGING.

IN RANKING, CANDIDATE SELECTION BEGINS AT THE POINT WHERE THE ADVERSE IMPACT OF THE TEST IS AT THE GREATEST POSSIBLE LEVEL.

IN FACT, RANKING CANDIDATES BY TEST SCORE TURNS OUT TO BE THE OPTIMUM STRATEGY FOR MAXIMIZING THE ADVERSE IMPACT OF A GIVEN TEST.

TO ME, THE USE OF RANKING IS A PRIMA FACIE INDICATOR THAT AFFIRMATIVE ACTION IS NOT AN IMPORTANT ORGANIZATIONAL POLICY.

ANOTHER IMPORTANT DECISION INVOLVES WHETHER THE CUTOFF IS TO BE USED RIGIDLY OR FLEXIBLY.

NO MATTER WHERE THE CUTOFF IS SET, THERE WILL ALWAYS EXIST A BORDERLINE AREA WHERE THERE ARE CANDIDATES WHOSE TEST SCORES ON ONE DAY ARE ABOVE THE CUTOFF, WHILE ON ANOTHER DAY ARE BELOW IT.

BY COMBINING OTHER INFORMATION WITH THE TEST SCORE AND BY BEING SELECTIVE, SOME VERY GOOD CANDIDATES CAN BE SELECTED FORM THE BORDERLINE AREA.

THE PRESENT NEEDS OF AN EMPLOYER'S AFFIRMATIVE ACTION PLAN PROVIDE ONE OF THE FACTORS THAT CAN BE CONSIERED IN THE EVALUATION OF BORDERLINE CANDIDATES.

FURTHER, MOST ORGANIZATIONS WITH AN AAP HAVE REALIZED THE NECESSITY OF ACCEPTING A HIGHER LEVEL OF RISK IN THE EMPLOYMENT OF INDIVIDUALS COVERED BY THE PROGRAM.

USING A PROPER CUTOFF SCORE IS THE MOST IMPORTANT FACTOR IN TRYING TO PREVENT THE GOALS OF A TESTING PROGRAM FROM CONFLICTING WITH THE GOALS OF AN AAP.

IN A MORE POSITIVE VEIN, I WOULD NOW LIKE TO DISCUSS THE WAYS THAT A TESTING PROGRAM CAN IMPROVE AN AAP.

FIRST, TESTS CAN HELP SCREEN OUT THOSE INDIVIDUALS WHOSE PROBABILITY OF FAILING ON THE JOB IS VERY HIGH EVEN WITH SPECIAL TRAINING AND EXTRA HELP.

THE KEY CONCEPT IS WHAT I CALL THE "AFFIRMATIVE ACTION DISTANCE."

ALTHOUGH THERE IS NO WAY TO DETERMINE A NUMERICAL MEASURE, THE IDEA IS TO ASSESS HOW "FAR" A GIVEN INDIVIDUAL FALLS SHORT OF THE BACKGROUND AND ABILITY PATTERN NORMALLY POSSESSED BY JOB INCUMBENTS.

IT ALSO INDICATES THE "DISTANCE" THAT THE INDIVIDUAL AND/OR THE ORGANIZATION ARE GOING TO HAVE TO COVER WITH SPECIAL PROGRAMS OR EXTRA EFFORT TO REACH THE CAPABILITY LEVELS OF THE OTHER INCUMBENTS.

IF THE "DISTANCE" EQUALS ZERO; THAT IS, IF A WOMAN OR MINORITY APPLICANT POSSESS THE NORMAL QUALIFICATIONS OR IS THE MOST QUALIFIED APPLICANT, THEN THERE IS NO AFFIRMATIVE ACTION INVOLVED.

IT IS SIMPLY A ROUTINE HIRE OF AN INDIVIDUAL WHO HAPPENS TO BE A WOMAN OR A MINORITY.

ON THE OTHER HAND, IF THE "AFFIRMATIVE ACTION DISTANCE" IS TOO GREAT, THEN THE PROBABILITY THAT THE INDIVIDUAL WILL FAIL ON THE JOB BECOMES UNACCEPTABLY HIGH.

THIS SITUATION IS VERY HARMFUL TO THE INDIVIDUAL, HURTS THE PRODUCITIVITY OF THE ORGANIZATION, AND DAMAGES THE CREDIBILITY OF AFFIRMATIVE ACTION.

IF IT HAPPENS TOO OFTEN, AFFIRMATIVE ACTION IS EQUATED WITH UNQUALIFIED.

TESTS CAN BE USED TO TRY TO PREVENT THE "DISTANCE" BETWEEN AN INDIVIDUAL'S PRESENT QUALIFICATIONS AND THE BASIC REQUIREMENTS OF A JOB FROM BECOMING TOO LARGE.

THIS CAN BE PARTICULARLY IMPORTANT IF A SUPERVISOR WANTS TO EMPLOY SOMEONE WHO IS ALMOST CERTAIN TO FAIL FOR THE PURPOSE OF PROVING THAT AFFIRMATIVE ACTION ISN'T ADVISABLE.

TESTS CAN ALSO BE USED TO SEARCH FOR TALENT AMONG CANDIDATES WHO WOULD OTHERWISE BE ASSUMED TO HAVE VERY LITTLE.

CANDIDATES WHO WOULD NORMALLY BE SCREENED OUT ON THE BASIS OF AN EDUCATION OR EMPLOYMENT RECORD WHICH SEEMS TO INDICATE LOW ABILITY LEVELS CAN BE TESTED INSTEAD OF SIMPLY BEING SCREENED OUT.

IN SOME CASES THE TESTS WILL FIND ABILITY WHERE THERE ARE NO OTHER INDICATORS THAT IT EXISTS.

AT PGANDE WE HAVE MANY SUCCESSFUL BLACK EMPLOYEES WHO ONLY PREEMPLOYMENT INDICATOR OF TALENT WAS THEIR TEST SCORE.

EXTENDING THE OPPORTUNITY TO TAKE TESTS CAN BE AN IMPORTANT AFFIRMATIVE ACTION.

THIS POSITIVE USE OF TESTS HAS BEEN LITTLE NOTED BY THE EEO AGENCIES BECAUSE THEY RARELY COME INTO CONTACT WITH THE INDIVIDUALS WHO HAVE BEEN BENEFITED, RATHER THAN BEEN HARMED, BY THE FACT THAT THEY WERE TESTED.

ANOTHER WAY THAT A TESTING PROGRAM AIDS AN AAP IS IN THE REASSURING EFFECT THAT IT HAS ON SUPERVISORS.

THEY KNOW THAT THE MINORITIES AND WOMEN THAT ARE REFERRED FOR HIRE HAVE BEEN TESTED AND ARE QUALIFIED FOR THE JOB.

PERHAPS SOME OF THE ORGANIZATIONS THAT HAVE COMPLETELY ELIMINATED TESTS IN THE NAME OF AFFIRMATIVE ACTION MAY HAVE HURT THEIR AAP MORE THAN THEY HAVE HELPED THEM.

IN SUMMARY, I WISH THAT I COULD SUMMARIZE.

I WISH THAT I COULD PROVIDE A FEW INSIGHTFUL SENTENCES THAT WOULD NEATLY BRING EVERYTHING INTO PERSPECTIVE.

BUT ON THE CONTRARY, IF YOU LEAVE THE RATHER OVER-BROAD GENERALIZATIONS OF THIS KIND OF PRESENTATION AND BEING TO DIG INTO THE COMPLEX TECHNICAL DETAIL THAT LURKS BENEATH, THE ISSUES BECOME EVEN MORE MURKY.

WE ARE IN A PERIOD OF TRANSITION AND WE MUST LEARN TO TOLERATE THE APPARENT INCONSISTENCIES AND INTERNAL CONFLICTS THAT USUALLY CHARACTERIZE TIMES OF CHANGE.

THE BOOK ABOUT BROWN VERSUS BOARD OF EDUCATION IS CALLED "SIMPLE JUSTICE."

IF A BOOK IS EVERY WRITTEN ABOUT THE CHALLENGE TO TESTING IT MIGHT BE CALLED "COMPLEX JUSTICE."

TESTING IS GOOD AND BAD, AND HELPFUL AND HURTFUL, AND LEGAL AND ILLEGAL, AND MUCH OF THE EFFECT THAT TESTS HAVE DEPENDS UPON THE WAY THEY ARE USED FROM EMPLOYER TO EMPLOYER.

SOMEHOW THE COURTS ARE SUPPOSED TO UNTANGLE IT ALL AND UNCOVER THE RULES THAT WILL PROVIDE A CLARITY TO REPLACE WHAT IS NOW SO OPAQUE.

THE PRESENT STATUS OF THE CHALLENGE TO TESTING IS ANALOGOUS TO THE HALF-GLASS OF WATER WHICH IS, BY DEFINITION, BOTH HALF-EMPTY AND HALF-FULL.

SOMEHOW WE MUST BOTH CELEBRATE THE EXTENT TO WHICH IT HAS BEEN FILLED AND YET AT THE SAME TIME DISPAIR THAT IT IS STILL PARTIALLY EMPTY.

White-Black Achievement Differences: The Narrowing Gap*

Lyle V. Jones

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During recent months, a great deal of publicity has been directed to recommendations for improving the quality of education in the United States. Especially notable are two reports, that of the National Commission on Excellence in Education (1983), "A Nation at Risk," and that of the Education Commission of the States' Task Force on Education for Economic Growth (1983), "Action for Excellence." Both of these efforts were motivated by a belief that achievement levels of the youth of our nation are insufficient to meet current and future societal demands. Both focus on means for improving the effectiveness of schooling and both reports include detailed recommendations developed for this purpose. These recommendations merit sustained public attention.

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*Prepared as an Invited Address, American Psychological Association Annual Convention, Anaheim, California, August 29, 1983. Some of the findings reported here were developed in the course of research supported by the Spencer Foundation and conducted during 1981-82, while the author was a Fellow at the Center for Advanced Study in the Behavioral Sciences. Nancy W. Burton and Ernest C. Davenport, Jr., contributed substantially to that research.

The present ferment about education in the United States is reminiscent of the post-Sputnik period of the late 1950s, and also of the 1960s, when attention was directed to correcting the educational imbalance among racial groups. Recall that the Elementary and Secondary School Act was first passed 18 years ago, in 1965. In that same year, Program Head Start was initiated. The Coleman report, Equality of Educational Opportunity (Coleman et al, 1966) appeared in 1966. Sesame Street began in 1969, and 1969-70 marked the largest wave of court-ordered school desegregation in the South.

In view of these and other social initiatives that began about 15 years ago, what can be said about the relative change since then in the average achievement levels of black youth in the United States? To answer this question, I shall refer to data collected by the National Assessment of Educational Progress and presented for ages 9 and 13 by Burton and Jones (1982) a year and a half ago. Added here is evidence for change at age 17, new evidence from the Third National Mathematics Assessment of 1982, and recently available data on ethnic differences in average scores on the Scholastic Aptitude Test (SAT) and the Graduate Record Examinations (GRE).

First, consider evidence of relative changes in reading skills for black and white school children. Reading performance was assessed by the National Assessment of Educational Progress at ages 9, 13, and 17, in 1971, 1975, and 1980 (National Assessment of Educational Progress, 1981). Exhibit 1 portrays differences between average performance of white youngsters and average performance of black youngsters for those three assessments, plotted by the childrens' year of birth. At each assessment year, the same group of reading exercises was administered to a given target age, and more than 2000 children responded to every exercise. Thus, for example, about 2500 13-year-olds in each national probability sample responded to the same 71 exercises in 1971, 1975, and 1980. For each assessment, the average percentage correct for blacks is subtracted from the average percentage correct for whites, and portrayed in Exhibit 1, by year of birth. This procedure provides trend lines not only at age 13, but also at ages 17 and 9. Noteworthy is the decline in the white-black average difference at each age; the white-black average difference of 20 percent correct for the birth year, 1953, is reduced to 10 percent correct for the birth year, 1970.

As the relative average performance of black children improved over the 1970's, what were the reading achievement trends for white children? Was improvement for the minority at the expense of the majority? For reading, the answer seems to be "no." At ages 13 and 17, for white children, average percentages of correct responses to the reading exercises remained stable from 1971 to 1980. At age 9, in 1980 compared with 1971, white children gave 3 percent more correct responses, while black children gave 10 percent more.

Recently, other results pertinent to national white-black differences in verbal skills have become available, for the SAT and

Exhibit I

WHITE-BLACK MEAN DIFFERENCES, VERBAL SKILLS

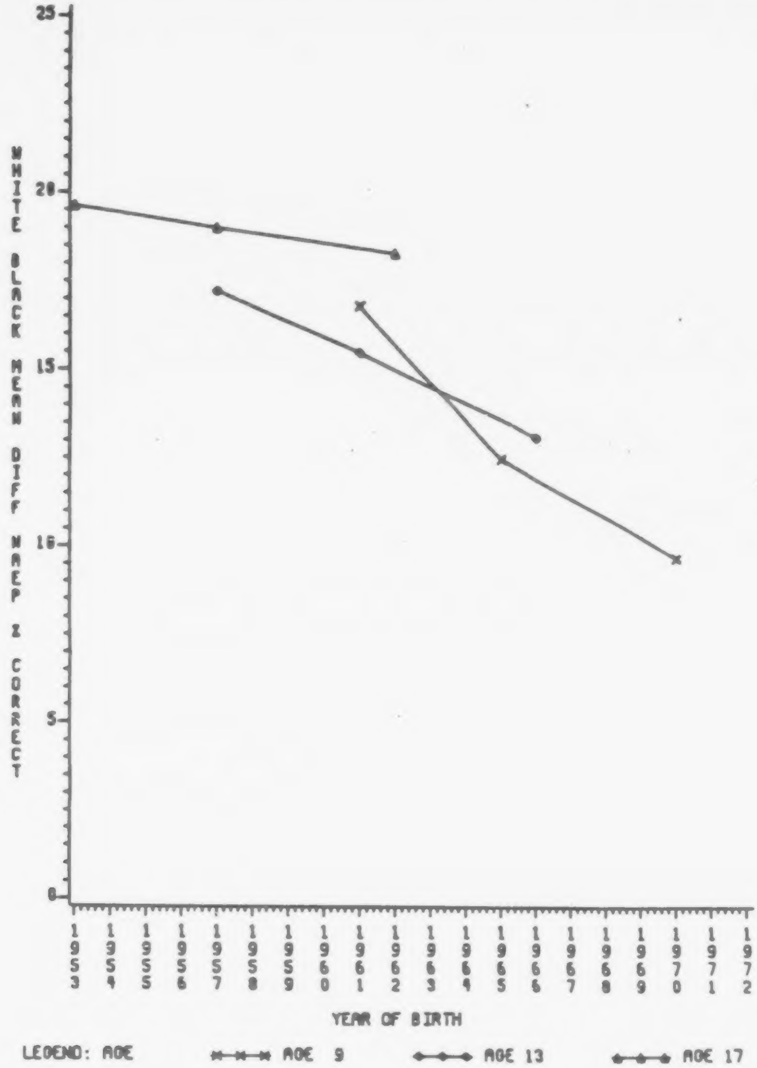
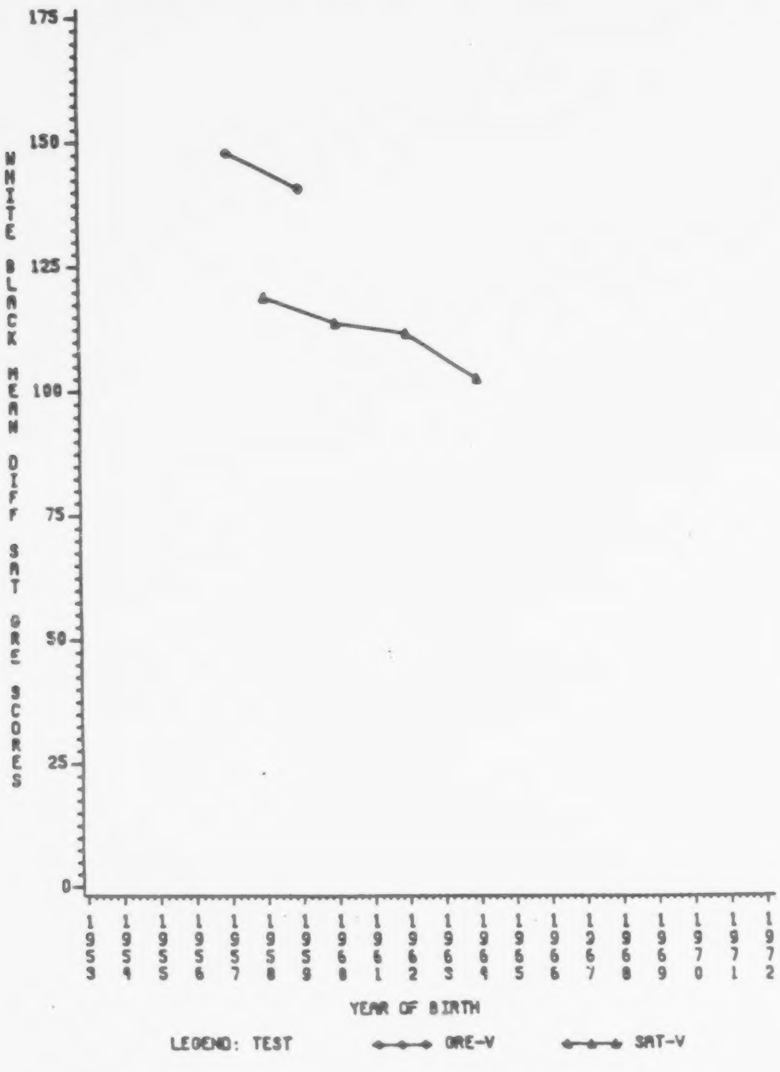


Exhibit 2

WHITE–BLACK MEAN DIFFERENCES, VERBAL SKILLS



for the GRE. Exhibit 2 portrays average white-black differences on SAT verbal scores for the period 1976 to 1982, presented by year of birth on the assumption that students are 18 years of age when they take the SAT. We see a monotonic decline in the average white-black difference for students taking the SAT. Average GRE verbal scores are available by ethnic group only for 1979 to 1981. The change in white-black average differences is plotted by year of birth, assuming GRE test takers are 22 years old, and is represented as the upper line segment in Exhibit 2. Despite possible shifts over time in the make-up of the samples of students who choose to take the SAT and the GRE, the relative improvement of average scores for black students is apparent.

The consistency of these trends with National Assessment trends is easy to see by superimposing Exhibits 1 and 2. The degree of consistency tempts an extrapolation of SAT and GRE trends, which suggests that further reduction in the white-black average differences for these test scores will be seen in future years, for example, for students born in 1965 and more recently as they take the SAT.

Now, consider a parallel review of changes in quantitative skills. National Assessment results are available at ages 9, 13, and 17 for mathematics assessed in 1973, 1978, and 1982 (National Assessment of Educational Progress, 1980, 1983). A common set of exercises was administered at each age in 1973 and again in 1978, and a second common set was administered in 1978 and 1982. White-black average differences in percentage correct are plotted against childrens' year of birth in Exhibit 3. Again, as was the case for reading skills, we see consistent reductions in the average difference between whites and blacks at each age, and considerably higher relative levels of average performance in mathematics for black children born since 1965 than for black children born earlier.

At ages 9 and 13, white children performed in 1982 neither better nor worse than in 1973 on mathematics exercises, while black children performed with more than 5 percent more correct answers in 1982. At age 17, both white and black students performed more poorly in 1982, whites by 3 percent and blacks by 1 percent, yielding a 2 percent decline in the white-black average difference.

Just as for verbal skills, data are available for SAT mathematics scores and for GRE quantitative scores, by race, for recent years. When the white-black average differences are plotted against year of birth, we see the trends of Exhibit 4. White-black average differences consistently decline. That the trend for SAT-M scores is consonant with findings from National Assessment is seen clearly from superimposing Exhibits 3 and 4.

We may safely conclude that the gap between white and black average verbal and quantitative achievement levels for elementary and secondary students has appreciably narrowed over the 1970s. Similar analyses of National Assessment data for other subjects - - writing,

Exhibit 3

WHITE-BLACK MEAN DIFFERENCES, QUANTITATIVE SKILLS

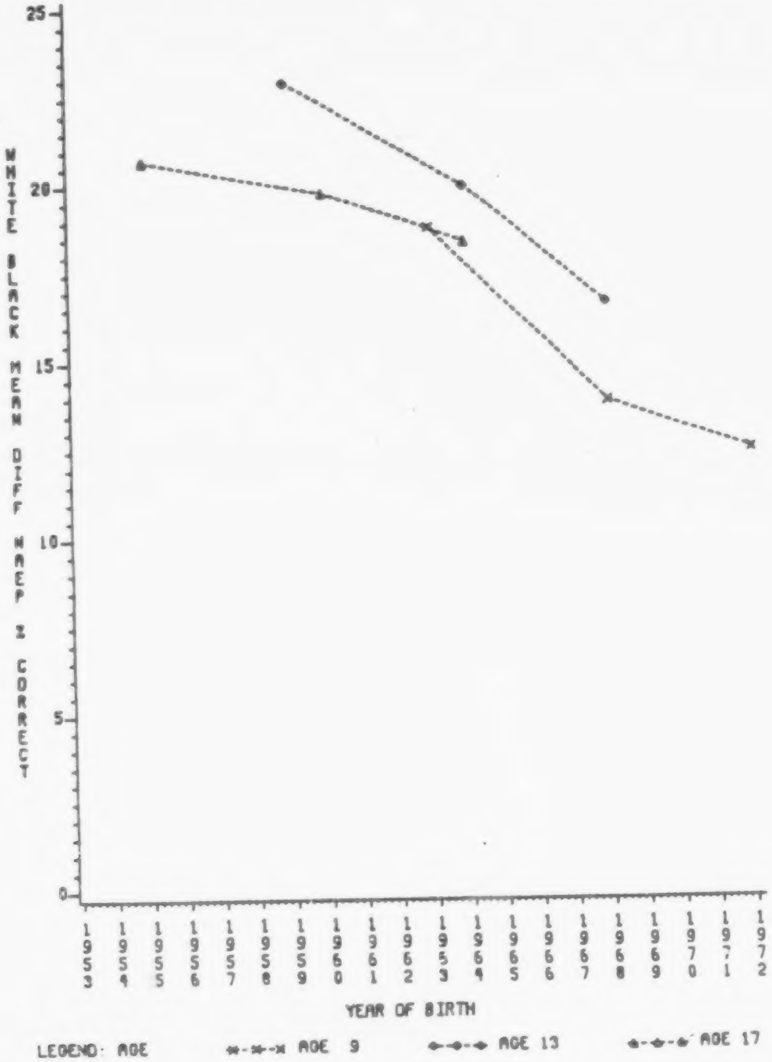
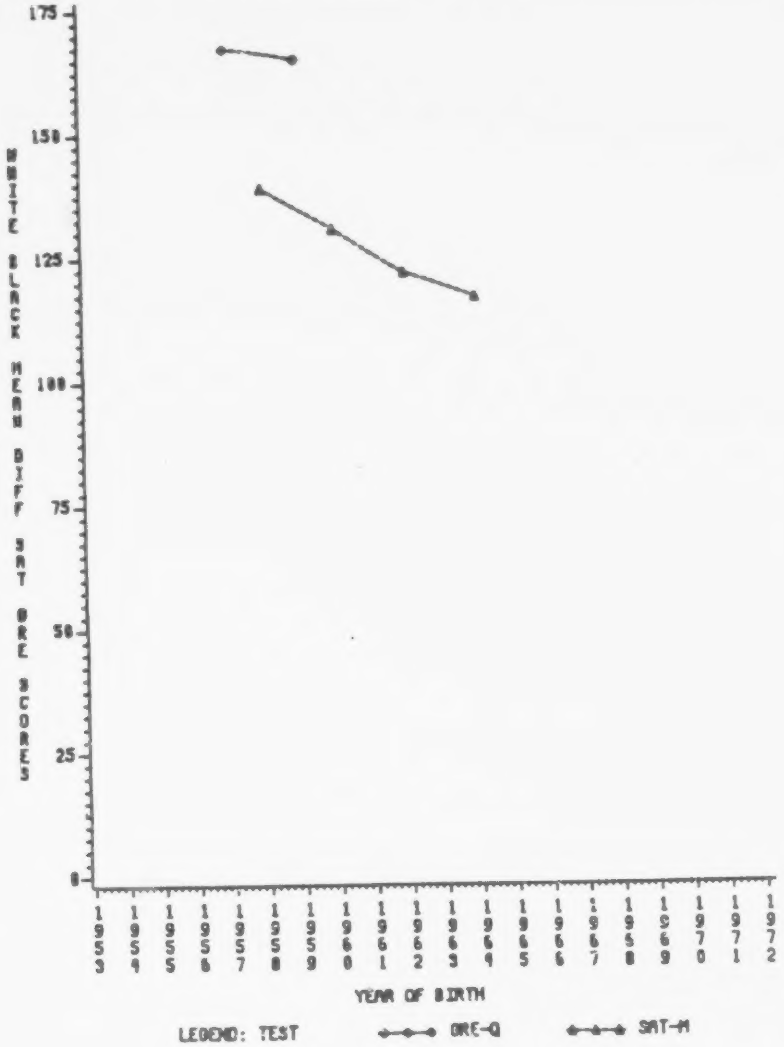


Exhibit 4

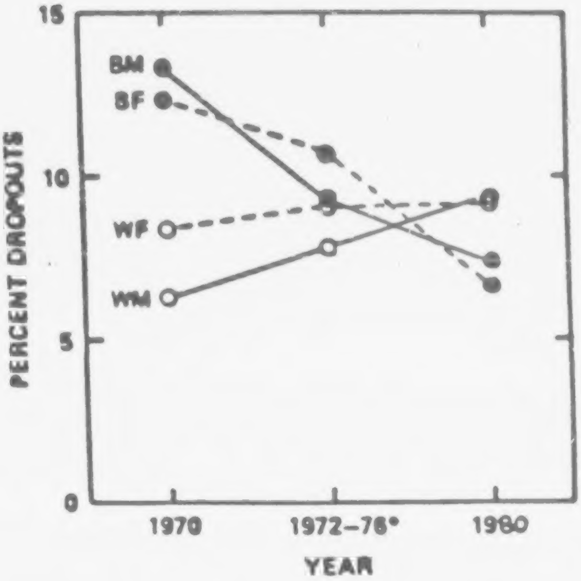
WHITE-BLACK MEAN DIFFERENCES, QUANTITATIVE SKILLS



science, social studies - - support the same conclusions for achievement in those areas.

Some may read into the results a vindication of social programs that were intended to enhance equality of educational opportunity. Others may focus on the relative improvement of incomes for many black families, or on attitudinal or motivational changes that have resulted from the broader participation of blacks in American society. The social changes affecting the blacks among us have been enormous, especially in the Southeastern United States, home of about half of the nation's black citizens. Barely 20 years ago, widespread demonstrations were in progress acts of civil disobedience to state and local statutes that restricted the access of black citizens to restaurants, lunch counters, and hotels. At that time, with rare exception, blacks and whites in the South had no opportunity for social, educational, political or economic contact. Today, blacks vote in large numbers, holding the balance of power in elections across the country. Many blacks have been elected to public office in the Deep South as elsewhere. Many blacks are accepted by all citizens as leaders in law, medicine, business, and higher education. Such profound changes might be expected to elevate the aspirations of black youngsters and to provide evidence that school achievement will enhance prospects for career success. The rapid improvement of average achievement levels of black youth is wholly consistent with this supposition. Also consistent is the substantial increase since the 1960s in the

Exhibit 5



*The median dropout rate for this 5-year period.

percentage of black students enrolled in college, and the change in high school dropout rates for black youth. Exhibit 5 shows, from census data for 1970 to 1980, the percent of youngsters at ages 16 and 17 not attending school, by race and sex. Note the dramatic increase in school attendance for 16- and 17-year-old black youth.

While recent progress in average achievement levels of black students has been dramatic, we should not lose sight of the continuing large average achievement difference between white and black children. Is it possible to discover factors responsible for that difference that are subject to policy control, to enable policy changes that might result in further reduction of the average difference? With this question in mind, I wish now to explore the relation of school achievement to characteristics of schools and of individual students. The target subject area is mathematics. I shall focus on results that are associated with differences among schools and on results that are associated with different levels of enrollment in mathematics courses. Such results may suggest desirable changes in school curriculum policies.

In 1975-76, a special mathematics study was conducted at age 13 and age 17 by the National Assessment of Educational Progress. Concerted efforts were made to assess all 13- and 17-year-olds in school who had

There are serious problems in interpreting the material presented from here to the end of the article
W.C.B.

been selected for the sample, as well as out-of-school 17-year-olds, both dropouts and early graduates. In response to the growing national interest in "basic skills," a subset of mathematics exercises was adapted from the first mathematics assessment (of 1973) to assess mastery of basic mathematical concepts in a variety of areas--computation, algebra, geometry, logic, and measurement. The special mathematics study entailed larger-than-usual samples. Instead of 2500 respondents per exercise, there were nearly 5000. Data at each age were collected from more than 400 schools, both public and private, selected as a national probability sample of all schools.

At each age, approximately 85 mathematics exercises were administered, half to one national sample of 5000 individuals and half to another. This allowed us to perform exploratory analysis of data for one sample, followed by cross-validation of results on another sample (Jones, Burton, & Davenport, 1982). Here, I shall summarize some findings for the two samples combined.

We define a mathematics score for every individual as the percentage of exercises for which the response is correct. For each age, 13 and 17, we have estimated the mean and the standard deviation of mathematics scores separately for all black females, black males, white females, and white males in the nation. We also have estimated the standard errors for the means, using half-sample replication procedures (McCarthy, 1969; Frankel, 1971; Lee, 1972) tailored to the

Exhibit 6

AGE 13

STATISTIC	RACE	SEX		
		FEMALE	MALE	BOTH
MEAN MATH SCORE (% CORRECT)	B	55	54	55
	W	72	72	72
	BOTH	69	70	70
STANDARD ERROR OF THE MEAN	B	1.4	1.4	
	W	.6	.5	

WITHIN-GROUP STANDARD DEVIATION = 16

Exhibit 7

AGE 17

Statistic	Race	Sex		
		Female	Male	Both
Mean Math Score (% Correct)	B	42	46	44
	W	66	71	69
	Both	63	68	66
Standard Error of the Mean	B	1.1	1.6	
	W	.5	.3	

Within-Group Standard Deviation = 19

National Assessment sampling design. Exhibit 6 displays these statistics for age 13.

The female-male difference in mean mathematics score is negligible at age 13; the mean sex difference is less than one standard error of the mean difference, both for blacks and for whites. Within both sexes, the mean difference by race at age 13 is highly significant. The mean difference in favor of whites at age 13 is about 1.1 times the pooled within-group standard deviation.

Exhibit 7 presents results for age 17. At age 17, males of both races achieve higher mean mathematics scores than females; the sex difference is significant beyond the .01 level for both races. The highly significant mean difference between whites and blacks at age 17 is about 1.4 times the pooled within-group standard deviation.

To summarize these findings,

(1) At age 13, for neither race is there evidence for a mean sex difference in mathematics achievement; at age 17, for both blacks and whites, the mean for males is slightly higher than that for females, by about 1/4 of the within-group standard deviation.

(2) At age 13, the mean performance of whites is higher than that of blacks by about 1.1 times the within-group standard deviation, while at age 17, the mean performance difference associated with race has grown to about 1.4 times the within-group standard deviation.

It is instructive, now, to look at results of some analyses of these data by multiple regression. A series of regression analyses were executed at age 13 and at age 17, both for the total samples and separately by race (Jones, Burton, and Davenport, 1982). Here, I shall discuss results only at age 17, and only for the analysis for the total samples. We seek answers to several questions. To what extent can students' mathematics achievement scores be predicted from the background variables? Which background variables are the most influential predictors? To what extent are mean white-black differences in the background variables related to mean white-black differences in mathematics achievement scores?

For this analysis, we separate predictor variables that can be observed at the school level--including regional and community variables as well as school means for individual variables--from the differences for individual variables of individuals from their school mean. We then can discover how the total predictable variance in mathematics achievement scores may be divided between schools and individuals. Also, we can answer the entirely separable question of whether mean white-black achievement differences are accounted for by regression more at the school level or more at the level of individuals within the schools.

Individual variables available at age 17 and used in the present study include parental education, number of kinds of reading materials in the home, the student's grade in school, high school grade point average, and number of years of study of high school algebra and geometry. School variables include region of the country, type of community, an index of parental occupational level (by school), and the school mean for each available individual variable.

At age 17, for the pooled sample of black and white students, the correlation of mathematics achievement and a linear composite of the background variables is found to be .72. The square of this value, .52, tells us that 52 percent of the variance of mathematics achievement scores can be predicted from the background variables. About one-third of this "predictable" variance is associated with school variables. The remaining two-thirds is associated with individual differences within schools.

Among the background variables, the best predictor by far is the number of years of high school algebra and geometry, which correlates .63 with achievement score, and has a standardized regression coefficient about twice as great as that for any other predictor. High school grade point average and grade in school also contribute prominently to the prediction. Among school variables, significant predictors are the mean number of reading materials in the home, mean number years of algebra and geometry courses taken, parental occupation level for the school, mean grade point average, mean parental education, and mean school grade for the 17-year-olds. Neither region nor community type yields a significant regression coefficient.

These results are consistent with findings recently reported by Welch, Anderson, and Harris (1982). Using data from the national mathematics assessment of 1977-78, they found that the number of semesters of high school mathematics was prominently related to mathematics achievement in three separate national samples of about 2200 in-school 17-year-old students each. In each sample, regression of achievement score on eight background variables, including ethnicity but excluding number of semesters of mathematics, accounted for about 30% of the variance in achievement scores; the added variance accounted for by the number of semesters of mathematics was also about 30%, as influential as the total set of the other background variables.

For our data, it is possible to compute regression-adjusted mathematics achievement scores for each student, i.e., to subtract from the actual score that component that is linearly related to the background variables. The average white-black difference in these adjusted scores is about 50% of the average white-black difference in the unadjusted scores (Jones, Burton, & Davenport, 1982), i.e., white-black mean differences in the background variables are able to account for about half of the white-black mean differences in mathematics achievement scores. In this accounting, school-to-school differences are found to be twice as influential as individual differences within school.

The results in Exhibit 8 illustrate dramatically the relation of mathematics test scores to the number of years of high school

Exhibit 8

AVERAGE MATH SCORE (% CORRECT) BY NUMBER OF MATH COURSES, AGE 17

No. of Courses	Average Score	Percent of Black Students	Percent of White Students
0	47	29	18
1	59	37	24
2	70	21	26
3	82	13	32

algebra and geometry. The average score for students who had not taken Algebra 1, Algebra 2, or Geometry is seen to be 47%, while the average for students who had had all three courses is 82% correct for the same mathematics exercises. This is a difference of nearly two standard deviations. The relation of mathematics achievement to courses taken is strong and clear.

Note, also (Exhibit 8), the disproportionate representation of black students and white students for differing numbers of years of high school algebra and geometry. About two-thirds of black students but only 42 percent of white students report having taken 0 or 1 year of high school algebra and geometry. This difference between black and white students in algebra and geometry course taking might be responsible for a large part of the white-black average difference in mathematics achievement scores.

There is some difference between black and white students who attend the same school in algebra and geometry course taking. Between-school differences in average number of courses taken also are found. Relevant data for students in 1975-76 appear in Exhibit 9, where the mean number of years of algebra and geometry courses is classified by the percentage of white students enrolled in each school. The average number of years of algebra and geometry taken in schools with less than 70 percent white students is 1.3 years. Note that almost three-fourths of all black students but only 8 percent of the white students were attending such schools.

AVERAGE MATHEXP BY PERCENT WHITE IN THE SCHOOL AT AGE 17

Percent White	Average Mathexp	Percent of All Blacks	Percent of All Whites
0-9	1.3	22	0
10-49	1.3	28	2
50-69	1.3	23	6
70-79	1.4	8	6
80-89	1.6	12	20
90-100	1.8	7	66
		100	100

In contrast, within schools at least 90 percent white, the average number of years of algebra and geometry taken is 1.8. These schools enroll about two-thirds of all white students but only 7 percent of the black students. This striking difference among schools suggests as a partial remedy to reduce further the average white-black differences in mathematics achievement, an increase in mathematics course requirements in schools that enroll large numbers of black students. (Note the difference between actual levels of algebra and geometry enrollments in all of these schools from the minimum level of three years of high-school mathematics that are recommended by the National Commission on Excellence in Education.)

Summary

National Assessment findings provide evidence at ages 9, 13, and 17 that the average relative achievement level of the nation's black students rose during the 1970s in reading, in mathematics, and in a variety of other learning areas. Similar evidence is seen for older students who took the SAT or the GRE, and trends are sufficiently strong and consistent to lead us to anticipate further gains in future years for average SAT and GRE scores of black students.

The evidence for this narrowing gap between average achievement levels of white and black youth seems incontrovertable. However, we cannot with confidence attribute the narrowing gap to educational or social programs that were initiated with this as their goal. It is possible that the trend reflects long-term effects of school desegregation, even though such effects have proven elusive to investigation in shorter time spans (e.g., Gerard and Miller, 1975; Gerard, 1983). Perhaps school desegregation failed during its early years, often marked by tension and strife, but more recently, has had beneficial educational effects for minority students. Or perhaps, as concluded by Crain and Mahard (Crain and Mahard, 1978; Crain, Mahard, and Narot, 1982), achievement gains are seen for black students attending desegregated schools from kindergarten or first grade, but not for black students whose desegrated education began in later school years. Evidence consistent with either of these possibilities is provided by Moe, Nacoste, and Insko (1981). They assessed student attitudes about students of different ethnic origin (black or white) in the same small-town North Carolina junior high school in 1966, a year after the school was integrated, and again in 1979, when the students had spent their entire school experience in integrated classrooms. White students in 1979 were far more accepting of black students in a wide variety of personal and social interactions than white students had been in 1966. To the extent that this finding would apply in other schools, such changes in attitude may create a school environment more conducive to higher achievement levels for black students.

Career opportunities for black citizens today are free from many of the limitations that were typical for earlier generations. Educational achievement is a requisite for most attractive careers, and the recognition by black students of many career options for which educational achievement is required may be contributing to average achievement gains of black students today as compared with black students a decade and more ago.

For many academic subjects, including mathematics, average achievement scores for black youth remain substantially lower than the average scores for whites. There is good reason, then, to attend to one of the eight recommendations of the ECS Task Force, "Serve better those students who are now unserved or underserved," i.e., "increase participation by women and minority students in courses such as mathematics and science that are related to careers in which these groups are underrepresented" (Education Commission of the States, 1983, p.40).

In 1975-76, the mean mathematics achievement score for black students at age 17 was below that of whites by 1.4 within-group standard deviations. About half of this difference is accounted for by regression on a set of school and student background variables. For reducing the average white-black difference, the school-to-school differences are found to be twice as influential as the within-school differences in the background variables.

The best single predictor of performance in mathematics at age 17 is the student's report of taking courses in first-year algebra, second-year algebra, and geometry. This result is consistent with that of Welch, Anderson, and Harris (1982). Both sets of findings strongly support the hypothesis that an effective way to improve mathematics achievement levels is further to encourage enrollment in mathematics courses in high school, as recommended by the National Commission on Excellence in Education.

A strong correlate of racial differences in average mathematics achievement scores is the lower enrollment in algebra and geometry courses in those high schools enrolling most blacks compared with those high schools enrolling most whites. Increased mathematics enrollments in the former set of high schools would be expected not only to reduce the school-to-school differences in average mathematics achievement scores, but to reduce the overall average white-black differences as well.

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Analyzing Meta-Analysis: Potential Problems, an Unsuccessful Replication, and Evaluation Criteria

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This article identifies some potential problems in meta-analysis research and suggests 14 specific criteria for evaluating the quality of meta-analysis research. The analysis is based on a review and replication of a meta-analysis research study. Our replication of the Terpstra (1981) study on methodological rigor in OD research found no evidence of positive-findings bias in OD. Our review of that research study identified a series of methodological problems that are applicable to other meta-analysis studies. These general problems are discussed, and some solutions are offered.

Meta-analysis is a relatively new and increasingly important research approach to accumulating knowledge in the social sciences (Glass, McGaw, & Smith, 1981; Hunter, Schmidt, & Jackson, 1982). As a methodologically rigorous technique for integrating findings across studies, it has been useful in such diverse fields as education (Hedges, 1982; Johnson, Johnson, & Maruyama, 1983; Kulik & Kulik, 1982), psychotherapy (see the special section of *Journal of Consulting and Clinical Psychology*, February 1983), personnel selection and validity generalization (Callender & Osburn, 1980; Osburn, Callender, Greener, & Ashworth, 1983; Schmidt & Hunter, 1977), leadership (Strube & Garcia, 1981), role conflict and role ambiguity (Fisher & Gitelson, 1983), and organization development (Bullock & Tubbs, 1983). Because of the newness and widespread applicability of meta-analysis, it is critical at this early stage to identify and resolve problems and discrepancies arising in meta-analysis research (see Green and Hall, 1984).

This article attempts to provide such an interim assessment of meta-analysis. Potential problems in meta-analysis are identified, and recommendations for solutions are suggested. To show the background for these problems, to underscore their importance, and to illustrate the issues, we use an extended example of a previous meta-analysis study. The research example used is the study on positive-findings bias in OD research reported by Terpstra (1981) and discussed by Bass (1983). Although the Terpstra study did not use the label "meta-analysis," the study was an example of meta-analysis in that it quantitatively pooled results across studies and statistically analyzed how study characteristics affected results. The review and replication of this study provides an excellent opportunity to closely examine potential problems and solutions in the meta-analysis style of research and to use the results of this analysis to further our understanding of potential bias in OD research.

Because a detailed inspection of this example is important for understanding the issues in meta-analysis, the first part of this paper reviews the Terpstra (1981) study and the Bass (1983) discussion, then replicates the meta-analysis. The second part presents potential problems and suggested solutions. The final section uses these resolutions as specific criteria for evaluating the quality of meta-analysis studies.

Review and Replication

Terpstra (1981)

Terpstra (1981) reported an inverse relationship between methodological rigor and reported outcomes of OD research. The *Jour-*

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nal of Applied Behavioral Science (*JABS*) was examined by Terpstra (1981) for the years 1965–1980. Fifty-two articles that (a) reported applications of four major OD techniques (laboratory training, survey feedback, team-building, and process consultation) and (b) analyzed and reported quantitative data were examined. Each study was assigned a rigor score on six dimensions (sampling strategy, sample size, control group utilization, random assignment, measurement strategy, and significance level used) using a 0-1 coding scheme (see Terpstra, 1981, for details). Interrater agreement was reported as 1.0 for all six dimensions. The total methodological rigor score (MRS) each study received was the sum of these six methodology dimensions (0 = *least rigorous*, 6 = *most rigorous*). The 52 studies were also classified on a seventh variable, success outcome, using a 3-point scale (*uniformly positive results*, *mixed or nonsignificant results*, or *uniformly negative results*). Interrater agreement was 1.0 on this variable as well. The mean MRS was found to be significantly different for the three outcome groups. Studies reporting uniformly negative results had higher MRSs than did those reporting mixed results. Studies reporting uniformly positive results were found to have lower MRSs than the other two groups. This finding was interpreted as evidence of positive findings bias in OD research.

Bass (1983)

Bass (1983) discussed this finding and proposed that the positive findings bias for OD research found by Terpstra might be explained by the philosophical background of the OD researchers, divided into two camps, the "softies" and "hardheads." According to Bass, the "hardheads" are convinced that rigorous methodological standards are the *sine qua non* of applied evaluation efforts. The "softies," on the other hand, are more liable to accept less rigorous evaluation efforts and use the data from such efforts as strong support of a philosophical (e.g., a humanistic orientation) position. Both camps, however, are seen as liable to response bias in their selection of data to support their explicit (or implicit) philosophical positions. Bass's (1983) discussion is based on the premise that Terpstra's (1981) reporting of positive findings bias in OD research is a valid contention. The next section of the article presents our replication of the Terpstra (1981) study (see Bullock and Svyantek, 1983).

Method

Sample

The list of 52 studies used in the original study was not available, so the present authors used the criteria reported by Terpstra (1981) to select studies for inclusion. In all, 90 articles were found and used in the present analysis.

Measures

To insure maximum comparability between the current replication and the original study, we used the same measures and analyses published in the original study. The total study period of 1965–1980 was divided into halves in order to develop reliability estimates and resolve preliminary coding problems. Using the published coding scheme, the authors independently scored the first half period, or the years 1965–1972. This period yielded 56 different articles, slightly more than the total sample of the original study.

Interrater Reliability

We found the coding scheme to be ambiguous in many respects and used our best independent judgments in applying the scheme. Several alternatives are available for estimating interrater reliability of these judgments. Recent literature suggests that many of these statistics, such as Cohen's (1968) kappa, are misleading when the results are skewed, a common occurrence with 0-1 coding schemes (Burton, 1981; Green, 1981; Jones, Johnson, Butler, & Main, 1983; Uebersax, 1982). Percentage of agreement has thus been suggested as the most accurate statistic for use in such situations (Burton, 1981; Jones et al., 1983). This procedure was used to assess interrater reliability between the two raters in the study.

Results, shown in Table 1, indicate interrater reliability for the coding of the 90 studies on the six methodological dimensions and outcome variable. Interrater reliability was generally lower for the first half of the data set (N = 56). This half of the data set was coded independently by the two raters. We attempted to improve interrater reliability for the coding scheme by developing more explicit decision rules for the same coding scheme. We discussed each instance of rater disagreement and reanalyzed the 56 articles. Where the coding was ambiguous, we resolved the discrepancies by a consensus decision rule based on our best judgment of how the coding scheme should be applied in such a situation. These more explicit decision rules for the coding scheme were then applied to the 34 studies in the second half of the time period (1973–1980). Interrater reliability for the second half is also shown in Table 1. This strategy improved the percentage of agreement for all variables, with the exception of sampling strategy, where we contin-

Table 1

Interrater Agreement for All Variables in Current Study

Variable	First half (1965–1972)[a]	Second half (1973–1980)[b]	Total sample
Sampling strategy	76.8	64.7	72.2
Sample size	69.6	94.1	78.9
Control group	76.8	94.1	83.3
Random assignment	85.7	94.1	88.9
Pretest–posttest	80.4	88.2	83.3
Significance level	69.6	85.3	76.7
Success outcomes	75.0	94.1	82.2

Note. All figures are percentages.

[a] Using Terpstra's published coding scheme.

[b] Using Terpstra's published coding scheme with more explicit decision rules.

ued to find cases where the coding scheme was ambiguous. In all cases, we resolved the discrepancies between raters by reanalyzing each article and used the consensus judgment in the data analysis below. Decision rule documentation and the sample of studies are available from the first author.

Results

As in the Terpstra (1981) study, we used analysis of variance (ANOVA) between the three success outcome groups for the mean methodological rigor score. Assuming an eta of .27 as found in the Terpstra study, the power of the Terpstra (1981) study was .40 and the power of the current study is .65; the ANOVA reported here had greater power than the Terpstra study because of the larger sample. The probability of a Type II error (beta) was .6 and .35 for the Terpstra study and the current study, respectively. There was no significant difference, $F(2, 87) = 0.217$, $p = .805$, in the mean methodological score among the three outcome groups. There was no evidence in the current study that more rigorous evaluation studies found more positive findings. Thus, the positive-findings bias reported by Terpstra was not found in this replication.

The pattern reported by Terpstra (1981) for the relationship between MRS and OD outcome score was not found. Terpstra (1981) reported that, as the degree of rigor increased, the outcome score decreased. In the current study, there was little difference between the mean MRS for uniformly positive ($M = 3.17$) and mixed outcome ($M = 3.26$) scores. The only uniformly negative study located by the current investigation had a MRS score of 4.0.

To further analyze the relationship between methodological rigor and outcome scores, a 7 × 7 correlation matrix of the six methodological variables and the outcome variable was calculated. The only significant correlation between a methodological rigor variable and outcome was for random assignment ($r = -.18$, $p = .04$). Significant but modest correlations between rigor variables were found between sample size and control groups ($r = .18$, $p = .045$), between random assignment and control groups ($r = .20$, $p = .03$), and between significance level and control groups ($r = .21$, $p = .02$).

Discussion

The present study failed to support Terpstra's (1981) conclusion that a positive findings bias exists in OD research. There are several differences between this study and the Terpstra (1981) study.

One discrepancy is the sample size. The present study was based on 90 studies fitting the published criteria, whereas the original study included only 52. The list of studies for the previous study is not available, so we were unable to reconcile this difference or to determine the degree of overlap. The larger sample of the current study provided greater power for the statistical tests and also greater external validity in generalizing to the domain sampled.

There were also difficulties in coding the variables. Terpstra's (1981) classification for determining the MRS for a study was found to be ambiguous. For example, it is not clear what measurement strategies are "at least a pretest–posttest measurement strategy" (p. 542) and which are not. Some studies assessed the impact of a T-group on its members by measuring behaviors at multiple points in the group's development. Although such studies did not measure behavior before and after the T-group, they used multiple waves of "posttest" measurement to empirically assess change in the group.

The total MRS is based on a simple addition of six variables coded 0-1. The rationale was ostensibly to use these six variables to assess the multiple facets of methodological rigor. The equal weighting of these six variables may produce the most valid measure of methodological rigor for research where the independent variables are under the control of the experimenter, but it is much less meaningful in field research where the individuals in the study plan and manage their own interventions. More relevant indicators of rigor and/or differential weighting of these indicators for OD field research may be necessary.

One major difference between the current study and Terpstra's (1981) study is the outcome-variable distribution. Terpstra (1981) found 35 studies to be uniformly positive, 12 to be mixed or nonsignificant, and 5 to be uniformly negative. The current study found 12, 77, and 1, respectively. Clearly, there is a large difference in the coding of this key variable.

The decision rule used in the current study to code the outcome variable was the following: If a study reported both significant and nonsignificant results, it was coded as "mixed." If the study reported all significant results, it was coded as "uniformly positive"; if the study reported all nonsignificant results, it was coded as "uniformly negative." This decision rule followed *Webster's* definition of "uniform": "having always the same form, manner, or degree: not varying or variable." Some studies coded as mixed in the current investigation may have been coded as uniformly positive or negative in the Terpstra study.

Without a clear distinction between mixed and uniform, the coding of the research outcome becomes a subjective judgment. Bass (1983) proposed that biases operating in OD "softies" and "hardheads" may have an effect on decisions made by investigators during a study. Two key decision areas of meta-analysis that may be affected by such biases are the coding of results and the decision rules used to code study characteristics (Green & Hall, 1984; Paul, in press). It is proposed that the system for coding OD results as presented by Terpstra (1981) and used in this replication is inadequate. One of several changes needed by future meta-analysis of OD research is new outcome measures for coding results of OD studies. This measure should be stated in as objective manner as possible to minimize potential bias as presented by Bass (1983).

Terpstra asserted that bias occurred because "top management typically invests heavily in an OD program," because "evaluators frequently find that they have been knowingly or unknowingly in the role of defendant" and because "professional consultants and evaluators want to stay in business" (p. 541). One problem with this assertion is the failure to consider alternative explanations for the original results. Before accepting the cause of possible bias as being the impropriety of OD evaluators, other major alternative explanations need to be considered and ruled out.

One alternative explanation for the findings is the peer review process. Manuscripts reporting positive findings in new areas of research are more likely to be published even if they contain some methodological shortcoming, whereas a study finding nonsignificant or negative results needs to demonstrate a strong design to be considered for publication. Poorly designed studies finding negative results are not normally published; only well-designed studies are considered in such a case. Such an explanation is consistent with the a posteriori analysis done by Terpstra: The only significantly different group was the one that had presented negative results and had the most rigorous design. If this explanation is correct, the bias would exist in many areas of published literature and could be better described as "positive published findings bias." Such a bias would not be specific to OD evaluators; it could be considered consensus judgment of the profession regarding findings important enough to publish. The coding scheme used by Terpstra might incorrectly identify such a bias in short research notes briefly reporting positive results important to the profession: If an article did not explicitly provide enough information for coding, but did use quantitative data, it might be coded as not rigorous following the coding scheme rather than not being included in the data set.

Another alternative explanation for the results may have been the mixture of interventions studied. Although Terpstra generalized the results to the entire field, only four types of interventions were selected for study. One intervention, laboratory training, was the focus of much *JABS* research, particularly in the early years. It may be that this particular intervention leads to null or negative results and that the bias found by Terpstra resulted not from evaluator impropriety but from the predominance of laboratory training interventions in the data set. Such an explanation is congruent with the research of Bowers (1973), who found negative results for T-group interventions, but positive results for other types of interventions. More rigorous studies of OD evaluation research have compared results for different intervention types for precisely this reason (see Porras, 1979; Porras & Berg, 1978; Golembiewski, Proehl, & Sink, 1981; Margulies, Wright, & Scholl, 1977). Terpstra (1982) found such problems of validity and generalization in a recent report of an extension of the Terpstra (1981) data set. Terpstra (1982) reported that "it is quite evident that varying degrees of methodological rigor are associated with the four OD intervention types" and concluded: "Thus, it may not be advisable to lump the major OD variants together for the purposes of generalizing as to either their degree of methodological rigor or their degree of effectiveness" (p. 415).

To test this proposal, we coded the studies for the type of intervention used. The majority of the studies in the current investigation were laboratory training studies ($N = 66$; 73.3%). In the second study reported by Terpstra, about two thirds of the studies concerned laboratory training (Terpstra, 1982, p. 416). Clearly, the data set being analyzed here is not an adequate sample of OD research, and conclusions about the relationship between methodological rigor and outcome score cannot be made for the domain of OD research. Thus, any bias found by the Terpstra study can only be safely applied to laboratory training.

Bass (1983) has discussed the possible implications of Terpstra's (1981) results for OD research; however, Bass's (1983) discussion should be interpreted as a tentative conceptual explanation because at present, the relation, if any, between methodological rigor and research outcome is unresolved.

In summary, Terpstra (1981) reported a positive findings bias in OD research. The finding was not confirmed in this replication of that study. Although Terpstra reported perfect reliability for the coding scheme in his study, the present replication encountered many problems concerned with reliability and validity in the coding effort. Serious problems occurred in the coding of the only dependent variable used in the research (reported outcomes of the research), where coding required a great deal of subjectivity in rater judgment. Although the current effort differed somewhat from the Terpstra study in the sample used and the need for extensive interrater discussion to produce agreement on coding, it replicated the earlier effort in all other significant areas. In spite of such parallels, the present study found no evidence of bias.

Bass (1983) contended that the "hardheads," in regard to OD research, may be biased against the findings of OD research. It may be that Terpstra's (1981) findings struck a responsive chord. Because the Terpstra (1981) findings were not replicable, it may be better to focus attention on the problems in meta-analysis research so that future research can answer more adequately the question of the relationship between methodological rigor and reported outcomes in OD (see Woodman and Wayne, in press). The next section identifies potential problems and solutions in meta-analysis research as exemplified in the Terpstra (1981) study. The final section proposes some explicit criteria for evaluating future meta-analysis research.

Potential Meta-Analysis Problems

Public availability. One key characteristic of the scientific method is public availability of the data and the research process. This hallmark of objective scientific inquiry is particularly critical for meta-analysis because meta-analysis research is itself based on publicly available information. In fact, one of the major contributions meta-analysis research makes beyond traditional literature reviews is that meta-analysis research is objectively verifiable, using measured concepts, quantitative data, and statistical analyses, whereas literature reviews depend on the subjective integration of results across studies by the reviewer. Paul (in press) suggested that "meta-analytic reviews are subject to all the problems and potential biases of any other means of literature review, but they may at least be more explicit such that some of the problems are easier to identify." For meta-analysis, it is important that several aspects of the study be publicly available: the list of studies used in the analysis, the coding rules used to convert the research studies to measured variables (including documentation on how problems in applying the coding scheme were resolved), copies of the data set and possibly copies of the analyses performed. In the Terpstra (1981) example, none of these are available for reanalysis or further inspection. Fisher and Gitelson (1983), for example, published as an appendix the full list of 43 studies used in their meta-analysis.

Coding documentation. The results of the meta-analysis rely on the adequacy of the coding scheme. The application of any coding scheme is an attempt to convert some complex reality to a set of mutually exclusive and exhaustive numbers and will thus always encounter problems of fitting the phenomena to the numerical scheme. In meta-analysis, the differences in the studies are confounded with differences in reporting style and thoroughness, so coding is often a difficult process. Detailed decision rules are necessary for adapting the coding scheme to the many special situations encountered. Codes for combinations and codes for unreported or missing data are usually necessary. If estimates for variables are to be made based on the published information, the estimation procedures should be delineated. Thus, in meta-analysis research, it is critical that detailed documentation of coding decision rules be maintained and publicly available.

Domain of generalization. Meta-analysis research examines studies fitting certain inclusion criteria. It is the right of a meta-analysis researcher to identify the domain within which some hypothesis is to be tested; the exercise of that right also brings the responsibility to limit generalizations of results to that domain. Meta-analysis researchers have emphasized the need to define content domain theoretically, excluding publication criteria or rigor criteria, although not all meta-analyses study the complete domain. For example, Fisher and Gitelson (1983) limited their search to an 11-year period and included two unpublished studies by the authors, but failed to search for the entire domain of studies. The Terpstra (1981) study limited the domain to articles published in a single journal, whereas other meta-analyses used all available studies (published and unpublished) fitting a well-defined conceptual domain. Literature reviews typically are limited to the most rigorous research in order to simplify the task of integrating subjectively the findings of the studies, but in meta-analysis, all studies fitting the content domain are included and any conjectures that rigor influences results are tested using variables coded by the meta-analysis, as was done in the Terpstra (1981) investigation. It is important to understand that these inclusion criteria define the domain to which generalizations are limited. In the Terpstra (1981) investigation, for example, the obtained results are limited to empirical studies of four intervention types published in one journal, not to the field of OD research in general.

Study characteristics. Literature reviews (e.g., Terpstra, 1982) often describe a research literature in terms of research designs used, sample sizes, sample demographics, authors' affiliation, and so forth as a guide to current research and as a stimulant for new research. Meta-analysis goes beyond a description of study characteristics to understand what the generalized results are and how the conduct of research affects those findings. Glass et al.'s (1981) approach to meta-analysis always codes descriptive characteristics of the studies analyzed, whereas Hunter et al. (1982) proposed that study characteristics should not be coded or analyzed unless and until the null hypothesis that the obtained variation of results could be explained by statistical artifacts was rejected. Our analysis of and replication of the Terpstra (1981) study indicates that study characteristics should be included in all meta-analysis research in order to understand fully the nature and limits of the research domain. Even if generalized validities are obtained following the Hunter et al. (1982) approach, it is still important to report study characteristics because they precisely define the domain over which the validities can be safely generalized. In the Terpstra (1981) investigation, the domain criteria allowed inclusion of four types of OD interventions, but a very unequal sampling of those interventions was actually obtained. As explained in a later report (Terpstra, 1982), the vast majority of studies analyzed were laboratory training studies, whereas the other three interventions were represented by only a handful of studies. Thus, although the domain criteria were broader, the obtained results can only be safely applied to laboratory training studies because the collection process failed to produce a representative mix of OD interventions. Domain limitations can only be known if descriptive characteristics are analyzed and reported.

Selective reporting. Meta-analysis is often a major undertaking involving detailed coding and analysis of dozens of variables. Simple probabilities will provide some statistically significant relationships in large-scale meta-analysis research. The selective reporting of results introduces a significant source of bias in the meta-analysis research process. This bias is particularly a problem in exploratory meta-analysis where variables are included based on convenience or ease of coding. Our suggestion for solving this potential problem is to develop the hypotheses to be tested in advance of the coding, code only those variables to be directly tested by the research, and fully report the results. Such a procedure will maintain meta-analysis as a vehicle for testing hypotheses of theoretical significance. The Terpstra (1981) study, for example, reported only one relationship excerpted from a large study of many variables described more fully by Terpstra (1982); thus, it is difficult to rule out the hypothesis that the reported finding was simply the result of chance.

Interpretation of results. As discussed by Bass (1983), human beings tend to confirm what we already believe to be the case, regardless of whether the position is hard-headed or soft. The problem is encountered in any line of research, but interpretation problems are particularly important in meta-analysis. Converting many varied research studies to a manageable set of coded variables is a process that potentially loses important meaning. The coded variables used in meta-analysis are often a relatively limited representation of a complex reality of empirical studies, so interpretation of obtained results must be made very carefully (Green & Hall, 1984). In the Terpstra (1981) investigation, the results of one hypothesis test on four intervention types published in one journal were interpreted as adequate evidence that OD researchers were biased. In meta-analysis, it is particularly appropriate to differentiate data-based conclusions from extrapolations because of the potential for generalizing the results beyond the boundaries of the domain and overinterpreting the meaning of relatively simple coding schemes. It is also important to rule out competing explanations for whatever results are obtained in order to increase confidence in the interpretation of those results.

Criteria for Evaluating Meta-Analysis Research

Based on our consideration of these problems, we propose a series of criteria for evaluating meta-analysis research. Meta-analysis research meeting acceptable quality standards

1. Uses a theoretical model as the basis of the meta-analysis research and tests hypotheses from that model.
2. Identifies precisely the domain within which the hypotheses are to be tested.
3. Includes all publicly available studies in the defined content domain (not just published studies, or easily available studies).
4. Avoids selecting studies based on criteria of methodological rigor, age of study, or publication status.
5. Publishes or makes available the final list of studies used in the analysis.
6. Selects and codes variables on theoretical grounds rather than convenience.
7. Provides detailed documentation of the coding scheme and the resolution of problems in applying the coding scheme, including estimation procedures used for missing data.
8. Uses multiple raters to apply the coding scheme and provides a rigorous assessment of interrater reliability.
9. Reports all variables analyzed in order to avoid problems of capitalizing on chance relationships in a subset of variables.
10. Publishes or makes available the data set used in analysis.

11. Considers alternative explanations for the findings obtained.

12. Limits generalization of results to the domain specified by the research.

13. Reports study characteristics in order to understand the nature and limits of the domain actually analyzed.

14. Reports the entire study in sufficient detail to allow for direct replication.

The 14 criteria outlined above are concerned with the theoretical basis of a meta-analysis, with methodological issues of how the meta-analysis is conducted, and with the reporting and availability of data and documentation. The use of these or similar criteria will, we think, establish and maintain high quality standards for meta-analysis research as applied to organization development and to other fields as well.

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Effects of Deficient Reporting on Meta-Analysis: A Conceptual Framework and Reanalysis

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A framework for studying the influence of reporting quality on meta-analytic results is presented in which three sources of reporting deficiency are identified: quality (adequacy) of publicizing, quality of macrolevel reporting, and quality of microlevel reporting. Each source is shown potentially to affect the integrity of the review process in a different way. To assess the influence of reporting quality empirically, 25 reports were sampled from the Smith, Glass, and Miller (1980) psychotherapy meta-analysis and recoded by the authors. Two sources of information pertinent to reporting quality were established: interrater reliabilities and confidence judgments. Reanalyses incorporating reliability corrections and confidence judgments suggested that deficient reporting injects considerable noise into meta-analytic data and can lead to spurious conclusions.

Glass's meta-analysis techniques (Glass, 1976, 1977; Glass, McGaw, & Smith, 1981) are used frequently now in integrative literature reviews. Yet the widespread criticism that followed their initial appearance (Eysenck, 1978; Gallo, 1978; Kazdin & Wilson, 1978; Kazrin, Durac, & Agteros, 1979; Mansfield & Busse, 1977; Presby, 1978) continues (e.g., Dillon, 1982; N. L. Smith, 1982). The focus of the present work is one source of that criticism: the quality of reporting of study characteristics or independent variables in primary (i.e., original) studies. The purpose is three-fold: (a) to establish a framework for studying the influence of reporting quality on meta-analytic outcomes; (b) to design and conduct a reanalysis to assess those influences; (c) to forward recommendations for future practice. The data set selected for reanalysis was the Smith et al. (1980) meta-analysis of psychotherapy research. We choose this vehicle for two reasons. First, it covers a substantial data base in an area of considerable interest to many psychologists. Second, this meta-analysis was more thoughtful, comprehensive, and generally of higher quality than many that followed.

Three different sources of reporting deficiency are identified: quality (adequacy) of publicizing, quality of macrolevel reporting, and quality of microlevel reporting.

Quality (Adequacy) of Publicizing

The existence or availability of data is often inadequately publicized (e.g., when studies are not written up, lost, or suppressed). This "file-drawer" problem (Rosenthal, 1979) can cause sampling bias. Seeking unpublished as well as published studies, as Smith et al. (1980) wisely did, reduces the problem but does not eliminate it.

The best known procedure for assessing the severity of the file-drawer threat is Rosenthal's (1979) fail-safe *N*, which calculates the number of hypothetical no-effect studies required to bring a significant overall *p* level to nonsignificance. However, Rosenthal's procedure is only applicable to a combining probabilities analysis. Using an analogous procedure for effect size analysis, Orwin (1983) showed that the file-drawer problem was unlikely to have contributed significantly to Smith et al.'s (1980) conclusion that psychotherapy is generally beneficial. However, more subtle and specific conclusions warrant concern, particularly when deduced from a relatively small subset of studies.

Quality of Macrolevel Reporting

For studies that are accessible and obtained by the meta-analyst, reporting quality is con-

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ceptualized in two ways: macrolevel and microlevel. Macrolevel reporting quality refers to the customary reporting practices of the research area being integrated.

Macrolevel reporting quality has a two-stage impact. First, it influences the selection of variables for coding by forcing the exclusion of potentially important variables on which information is never or rarely reported. This clearly occurred in the Smith et al. (1980) study where a variable's likelihood of being reported was made an explicit component of variable selection policy and where the existence of potentially important but excluded variables were acknowledged (see Smith et al., 1980, p. 59). Second, it influences the operationalization of variables by limiting measurement options and the precision with which a given variable can be mapped. For example, noting that only 4% of their studies reported actual client IQ scores, Smith et al. substituted a three-category item that required no reported IQ scores.

Through these influences, macrolevel reporting quality affects later analyses in predictable ways. Omitting variables that cause effect size variation results in underspecification of statistical models and, consequently, biased parameter estimates for included variables correlated with one or more omitted variables (see Campbell & Boruch, 1975). Collapsing continuous variables into gross categorizations artificially deflates variance, diminishing analytic sensitivity and biasing parameter estimates (see Kerlinger & Pedhazur, 1973). It may also result in distributional problems (e.g., extreme skewness) that further attenuate observed relations (see Cohen & Cohen, 1975). More sophisticated analytical strategies (e.g., Hedges, 1982) potentially offer improvements. Structural equation models, for example, can handle both specification error and measurement error in ways that regression/analysis of covariance (ANCOVA) models cannot (Kenny, 1979). The adoption of more sophisticated strategies by meta-analysts is a welcome development, but will not obviate the need for reporting quality concerns; rather, it will compel more explicit treatment of those concerns.

Quality of Microlevel Reporting

Whereas macrolevel reporting quality describes the customary reporting practices of an area, microlevel reporting quality describes the individual differences among the area's investigators (i.e., report writers) in the completeness, accuracy, and clarity with which those customs are upheld. It influences meta-analysis at the coding stage. Inadequate reporting of study characteristics leads to coder uncertainty, which in turn leads to error (i.e., some recorded values will be incorrect). Smith et al. (1980) recognized the problem and devised certain coding conventions for several variables as a partial solution. When an investigator failed to report therapist experience, for example, coders assigned experience on the basis of education. Such devices serve to standardize coder decisions under uncertainty and therefore increase intercoder agreement. It is arguable whether they eliminate error, however, because the convention-dictated choice will often be wrong. Further, convention-generated errors may not balance out but consistently over- or underestimate the true value.

Microlevel reporting quality, like macrolevel, affects later analyses in predictable ways. In the dependent variable, errors of observation destabilize parameter estimates and decrease statistical power, whereas in independent variables, they cause parameter estimates to be biased (Kerlinger & Pedhazur, 1973). Like the collapsing of continuous variables into gross categories, the use of coding conventions artificially deflates true variance, thereby diminishing analytic sensitivity. Any systematic over- and underestimation of true values by coding conventions exacerbates matters further. Once again, more sophisticated analytical strategies than are presently typical should bring progress, particularly those that allow user-defined measurement models.

Approach of the Present Reanalysis

Whether reporting of study characteristics actually affects meta-analysis results, and to a degree that warrants concern, is an empirical question. Prior reanalyses by Orwin and Cordray (1982) of both the psychotherapy (Smith et al., 1980) and class size (Glass & Smith, 1979) meta-analyses indicated possible effects, but Orwin and Cordray's reanalyses were limited in their confinement to the data as coded by Glass and Smith. The present study eliminates this constraint by returning to the primary studies. It establishes two sources of information pertinent to investigating the influence of reporting quality: interrater reliabilities and confidence judgments.

Interrater Reliabilities

Rationale. One consequence of differences in microlevel reporting quality, coder error, may be estimated by one or more measures of interrater reliability. The linkage from reporting quality to interrater reliability is as follows:

$$\text{deficient reporting} \rightarrow \text{coder uncertainty} \rightarrow \text{coder error} \rightarrow \text{decreased reliability}$$

Smith et al. (1980) computed a 92% overall agreement rate across a sample of variables over a sample of reports. Subsequent meta-analysts treated reliability much the same way (Stock, Okun, Haring, Miller, & Kinney, 1982). Psychometrically, there are at least two problems with this practice. First, the coding form is not a multiitem measure of a trait (such that a total-scale reliability would be meaningful) but a list of disparate items. Some, like publication date, will have high agreement, whereas others may not. Across-the-board reliabilities are difficult to incorporate meaningfully into subsequent analyses, and they also fail to identify problematic items needing refinement or replacement. Second, the use of simple agreement rates as reliability estimates has several pitfalls. When response marginals are extreme, high agreement occurs by chance (Hartmann, 1977). These conditions are common in meta-analysis (see, for example, historical effects in Kulik, Kulik, & Cohen, 1979; design validity in Smith, 1980). Additional problems arise when marginal response rates differ across raters (Cohen, 1960) or when items are ordinal rather than nominal (e.g., Smith et al.'s 3-point IQ scale). Finally, little or no attention has been given to deriving an overall agreement rate for more than two raters.

Of the various statistics proposed for removing chance agreement, Cohen's (1960) kappa (K) is generally regarded as the best (Fleiss, Cohen, & Everett, 1969; Hartmann, 1977; Light, 1971). K has several additional desirable properties: It requires no assumption of identical marginals across raters; it can be generalized to more than two raters (Fleiss, 1971; Light, 1971); it can be weighted to reflect varying degrees of disagreement (Cohen, 1968), and large sample standard errors have been derived for it (Fleiss et al., 1969).

For continuous variables, the use of Pearson's r to estimate interrater reliabilities is analogous to its use in psychometrics to estimate test reliabilities from parallel forms (see Stanley, 1971). As such, it bears the same relation to formal reliability theory. This characteristic has led some writers (e.g., Hartmann, 1977) to advocate extending the use of r, in the form of ϕ, to dichotomous items.

Several measures of interrater reliability are computed for each meta-analytic variable: agreement and r for continuous variables; agreement, r, and weighted K for ordinal categorical variables; and agreement and unweighted K for nominal categorical variables. When nominal variables are dichotomous, r (in the form of ϕ) will also be computed.

Expected findings. We expect interrater reliabilities to vary greatly across coding items, reflecting the existence of considerable variation in macrolevel reporting quality across variables. If born out, this finding would confirm that overall average agreement rates are of little use in extrapolating to the reliabilities of individual items. We also expect that recalculating the Smith et al. (1980) regression analyses with corrections for attenuation (provided by interrater reliabilities) will yield substantially higher R squares and differentially affected beta coefficients. If born out, these findings would confirm that ignoring unreliability potentially misleads meta-analysts into erroneous conclusions.

Limitations. Unreliability stems from coder disagreement, which in turn is indicative of coder uncertainty and, through coder uncertainty, deficient reporting. However, good reporting does not guarantee agreement, because coding errors, idiosyncratic interpretations, and so on will sometimes preclude it. Conversely, agreement will sometimes occur when reporting quality is low, either by chance or by predetermined coding conventions. (Statistics like K lessen the chance problem only).

Confidence Judgments

Rationale. Because reliability alone is a flawed indicator of reporting quality, it is desirable to seek more direct methods of identifying well-reported information. Supplying confidence judgments is one such method. This tactic is based on the premise that questionable information should not be discarded, nor should it be allowed to mingle freely with less questionable information, as is usually done. The former wastes information which, although flawed, may be the best available on a given variable, whereas the latter injects noise at best and bias at worst into a system already beset by both problems. With confidence ratings, questionable information can be described as such, and both data point and descriptor entered into the data file.

The linkage from reporting quality to confidence is as follows:

$$\begin{matrix}\text{deficient} & & \text{coder} & & \text{decreased}\\ \text{reporting} & \rightarrow & \text{uncertainty} & \rightarrow & \text{confidence}\end{matrix}$$

Note that coder uncertainty is linked directly to decreased confidence, unlike its linkage to decreased reliability.

Expected findings. We expect confidence to vary greatly across coding items, reflecting the existence of considerable variation in macrolevel reporting quality. Similarly, we expect the proportion of high confidence variables to vary greatly across studies, reflecting the existence of considerable variation in micro-level reporting quality. We also expect that for each item interrater reliability will be greater for high-confidence cases than for all cases taken together because reporting quality, as assessed by confidence ratings, is an important determinant of reliability. Finally, we expect the absolute values of bivariate correlations to be larger for high-confidence cases than for all cases taken together, reflecting the degradatory effect of deficient reporting quality on observed substantive relations.

Limitation. A limitation of confidence judgments is that a variable may be well reported but still not codable with confidence. Despite every intent to use decision rules as prespecified, ambiguities do arise to preclude this. The end result is a reporting-irrelevant reduction in confidence. However, it must be stressed that this is a rare phenomenon.

Time-of-Task Side Study

The reading/coding stage of meta-analysis is highly time consuming, particularly when, as in the Smith et al. (1980) study, hundreds of reports are involved. It is therefore prudent to ask if the value of the new information justifies the cost, in time, of collecting it. For this reason, a time-of-task side study was conducted to estimate the additional time required to perform the expanded coding task.

Methods

Population and Sampling

Definition of population. The population of research reports was defined as all reports in the original psychotherapy meta-analysis data base, as listed in the "Bibliography of the Psychotherapy Meta-Analysis" (Smith et al., 1980). There were 456 reports enumerated. The discrepancy between the number of reports enumerated and the number of studies counted by Smith et al. (468) was due to some reports contributing what were, in Smith et al.'s view, more than one study.

Sampling. Thirty-five reports were then randomly selected. The first 5 sampled were designated as pilot cases, the next 25 were designated as main sample cases, and the remaining 5 were designated as alternates. All reports were successfully obtained except one unpublished paper, for which a replacement report was randomly selected from the alternates. The five pilot cases and the 25 main sample cases are referenced in the Appendix.

Coding

Coders. The two authors served as coders for the study. (The first author is referred to as Coder 1; the second, as Coder 2.)

Coding form. Twenty-five variables from the original Smith et al. (1980) coding form were selected for recoding. Variables were selected to: (a) assure a range of macrolevel and microlevel reporting quality; (b) include all variables used in the original Smith et al. regression analyses; and (c) include additional methodological variables. The included set of variables were: date and form of publication; professional affiliation, degree of blinding, and allegiance to therapy of experimenter; diagnosis, IQ, age, and source (how solicited) of clients; therapist experience; method of client and therapist assignment to groups; comparison type; control group type; attrition rates; internal validity of study; modality and location of treatment; type, follow-up time, and rated reactivity of outcome measure; method of calculation and source of means for effect size; and effect size.

Most variables were labeled with confidence ratings. Exceptions were variables for which confidence ratings would have been superfluous (publication date and source of publication) or inappropriate (e.g., items describing coder operations like effect size calculation). Overall, 20 variables were labeled with confidence ratings. After pilot testing various confidence scales, it was determined that three levels of confidence were the most that could be reliably discriminated. In addition, each category was labeled with a verbal descriptor to minimize rater drift (see Kazdin, 1977). Labels were as follows: 3 = certain or almost certain, 2 = more likely than not, 1 = guess. Modifications of Smith et al.'s variables themselves were strictly avoided, because the intent was to replicate the original process as faithfully as possible.

Coding process. Prior to coding the main sample, the 25 reports were randomly ordered and coders were instructed to adhere to the resulting sequence. The purpose of equating coders on order was to enable examination of changes in interrater reliabilities over time (see Jackson, 1980). It was assumed, given the random ordering, that any trend in interrater reliabilities over reports would occur for reasons other than reporting quality (e.g., practice, boredom). Equating for order permits this trend to be detected and, if desired, removed.

Coders worked independently and without access to the original data.

Time-of-task side study. A subset of three journal articles and two dissertations was selected (the approximate ratio in Smith et al.). Conforming to this ratio was important for representativeness because dissertations take considerably longer to code. For each report the basic recoding task (i.e., reading the report and coding the original Smith et al. variables) was timed with one stopwatch, whereas confidence ratings were timed with a second stopwatch.

Preprocessing

As used here, the term *observation* refers to a given effect size and its accompanying study characteristics. According to Smith et al.'s decision rules, all reported observations from a given report were to be coded unless judged by the coder as redundant. Additional rules governed other decisions, such as whether to combine the subtest scores of a multifactorial test battery. These decisions present potential sources of disagreement about the set of observations contributed by each report and as such pose legitimate concerns about coding replicability. The goals of the present study, however, require the extraction of a matched set of observations across coders; otherwise, much coder disagreement would be irrelevant noise (e.g., two coders disagreeing on the reactivity of an outcome measure when they are not referring to the same measure). From the 25 reports, the Smith et al. original data set yielded 81 observations, compared with 159 and 172 for data sets of Coder 1 and Coder 2, respectively; agreement on inclusion was obviously imperfect, necessitating that observations be matched post hoc.

Results were as follows: Over the 25 reports, there were 53 observations common to all three data sets. These were isolated and designated as File 1. An additional 73 cases were common to data of Coders 1 and 2. These and the original 53 were isolated and designated as File 2. Therefore, File 1 was composed of 53 triple observations, and File 2, of 126 double observations. Each observation in each file was accompanied by the appropriate vector of confidence ratings.

Results

Comparability of Recodings to Originals

The credibility of the reanalyses described later rests on the assumption that the present coders' grasp of the meaning of the variables and response categories, decision rules, guidelines, and computational procedures is comparable with that of the original coders. Therefore, two tests were conducted to determine whether the assumption was tenable. The first was an assessment of overall agreement rates. As noted earlier, Smith et al. (1980) obtained an overall agreement rate of 92% across a reduced coding form. If the present recodings are comparable with theirs, similar agreement rates should be found. Unfortunately, this could not be directly assessed because the list of variables coded for Smith et al.'s reliability analysis had not been retained and could not be resurrected (Smith, personal communication, June, 1982). Consequently, they had to be approximated. Four different overlapping subsets of variables were constructed. Because the use of agreement rate makes little sense with continuous variables, only categorical variables were selected into the subsets. Subset 1 consisted of all recoded categorical variables (excluding variables describing the computation of effect size), of which there were 17. Subset 2 was identical to Subset 1 except that ordinal variables, for which a simple agreement rate is particularly problematic, were removed. Subsets 3 and 4 were composed of categorical variables eventually used by Smith et al. in their regression analyses. (The estimated reliabilities of these variables warranted particular attention because of the scheduled reanalyses.) Subsets 3 and 4 were similar to Subsets 1 and 2 in all other respects; Subset 3 included all available categorical variables, whereas Subset 4 excluded those that were ordinal.

Overall agreement rates were computed across the variables of each subset over the 53 common cases for each possible pairing of coders: original (Coder 0)–Coder 1, Coder

0–Coder 2, and Coder 1–Coder 2.[1] The Coder 1–Coder 2 pairing usually produced the highest rates (three of four subsets); their average overall rate of .90 was only .02 less than Smith et al.'s reported rate. This is both practically and statistically nonsignificant. (Designating .92 as the population proportion and .90 as a sample value, the Z test for sample proportions yields $Z = 0.49$, $p > .50$.) Their abilities to agree with Coder 0 were not dramatically lower (.87 and .83, respectively). Finally, averaging across all three rater pairs and all four variable subsets yields a grand mean of .87, which is not significantly less than .92 ($Z = 1.08$, $p > .25$).

The second test of comparability was an examination of the regression model's consistency across coders. Based on the multidimensional scaling of clinician ratings, Smith et al. partitioned the data into three psychotherapy classes and six subclasses and ran their regression models within classes and subclasses. We could not use their partitioning scheme in this test, because the number of cases (53) precluded it. However, this posed no problem because the model specification had been invariate across classes and subclasses. Differences between coders were small. Of 16 independent variables, only five showed any inconsistency across coders in coefficient signs, with no coder consistently deviating from the other two. An inference was affected in only one of the five (individual therapy vs. other).

A test for equality of regression slopes yielded no significant differences over the three equations, $F(30, 108) = 1.48$, $p > .05$. Although the test assumes independence of observations, the violation of this assumption has the effect of reducing error variance, thereby inflating the Type I error rate. Clearly, a test at the true .05 rate would also fail to reject the null hypothesis. In sum, the comparison of regression runs, like the comparisons of agreement rates, supports the assumption of comparability across coders.

Interrater Reliabilities

Order effects. As noted previously, coders ordered their reports identically to permit the examination of changes in interrater reliability over time. A per case agreement rate was computed (number of variables agreed upon/number of variables) and plotted against case sequence. Little if any trend was apparent ($r = -.07$, $p = .44$). In regression terms, increasing the case sequence by one decreased agreement rate by less than $^1/_{10}$ of 1% ($b = -0.09$). Due to the presence of serial correlation in the residuals (Durbin–Watson statistic = 0.58), the significance level ($p = .44$) is only approximate. However, this would be of concern only with a closer call (e.g., $p = .10$) and some suggestion that the magnitude of b was of practical significance. From this exercise, it was concluded that further consideration of detrending interrater reliabilities was unnecessary.

Variation in reliabilities across variables. The computation of each reliability estimate was straightforward in File 2, which had only two coders. File 1, with three coders, posed a problem. Unlike K, neither agreement rate nor r have standard N-way ($N > 2$) generalizations. After considering other options, we computed the 2-way statistics over each of the three rater pairings and then averaged across them. For K, Light's (1971) 3-way formula was used.

The results are summarized as follows:

File 1

Agreement rate: *Mdn* = .79, interquartile range = .52 to .93, and full range = .24 to 1.00.

Kappa: *Mdn* = .62, interquartile range = .40 to .88, and full range = −.02 to 1.00

Intercoder correlation: *Mdn* = .66, interquartile range = .62 to .81, and full range = .42 to .99.

File 2

Agreement rate: *Mdn* = .84, interquartile range = .65 to .98, and full range = .39 to 1.00.

Kappa: *Mdn* = .66, interquartile range = .48 to .95, and full range = −.05 to 1.00

Intercoder correlation: *Mdn* = .78, interquartile range = .70 to .95, and full range = .56 to 1.00.

In both files, there is clearly wide variation in interrater reliability across coding items on all three measures.

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[1] The original coders were treated as a single individual despite the fact that they were really two (Smith & Glass) working in close collaboration.

Reliability-corrected regression analysis. Of the 16 predictor variables in the Smith et al. regression runs, only two were taken directly off the coding form; dummy coded indicators, transformations, and interaction terms comprised the rest. Additional agreement rates, Ks, and *r*s were computed for each of these as required. Four regressions were then run, each using a different set of reliability estimates.[2] Run 1 used the highest of the four or six estimates available for each variable. In the spirit of bracketing effects (Boruch, Cordray, & Wortman, 1981), the purpose of Run 1 was to provide a lower bound on the amount of change produced by disattenuation. On subsequent runs agreement rates were eliminated on the basis of their previously discussed shortcomings. This left, within each file, the choice between K and *r* where the choice existed (11 out of 16 variables). Because differences were generally small and *r* was available for all variables, whereas K was not, *r*s were chosen.[3] Additional factors contributing to the decision were the generally higher values of *r*s, which would make the corrections more conservative, and the well-established relation between *r* and formal reliability theory (see Stanley, 1971).

The question of which file to use remained. File 1 contained input from the original coders, whereas File 2 did not, and input from three sources rather than two. In contrast, File 2 estimates were based on more than twice as many cases and on coders whose close contact may be more representative of the original coding environment. These estimates were typically higher. It was therefore decided to use both sets of estimates. In maintaining the flow from conservative to liberal corrections, the File 2 estimates were used in Run 2, and the File 1 estimates, in Run 3. A final run, intended as the most liberal credible analysis, replicated Run 3 but with the criterion variable (effect size) as well as the predictors disattenuated. This necessarily causes across-the-board increases in regression coefficients, semipartial correlation coefficients, and *R* squares. The reliability estimates for Runs 1 to 4 are shown in Table 1.

Table 1
Reliability Estimates Used in Reliability-Corrected Regression Runs

Variable	Run 1	Run 2	Run 3	Run 4
Diagnosis: neurotic, phobic, or depressive	0.98	0.98	0.89	0.89
Diagnosis: delinquent, felon, or habituee	1.00	1.00	1.00	1.00
Diagnosis: psychotic	1.00	1.00	1.00	1.00
Clients self-presented	0.97	0.57	0.71	0.71
Clients solicited	0.93	0.86	0.81	0.81
Individual therapy	1.00	1.00	0.85	0.85
Group therapy	0.98	0.96	0.94	0.94
Client IQ	0.69	0.69	0.60	0.60
Client age[a]	0.99	0.99	0.91	0.91
Therapist exper. × neurotic diagnosis	0.76	0.75	0.70	0.70
Therapist exper. × delinquent diagnosis	1.00	1.00	1.00	1.00
Internal validity	0.76	0.71	0.42	0.42
Follow-up time[b]	0.99	0.99	0.95	0.95
Outcome type[c]	0.87	0.70	0.76	0.76
Reactivity[d]	0.57	0.56	0.57	0.57
ES	1.00	1.00	1.00	0.78

[a] Transformed age = $(\text{age} - 25)(|\text{age} - 25|)^{1/2}$. [b] Transformed follow-up = $(\text{follow-up})^{1/2}$. [c] "Other" category removed for purpose of dichotomization. [d] Transformed reactivity = $(\text{reactivity})^{2.25}$.

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[2] Several methods for effecting the reliability corrections were considered, after which Cohen and Cohen's (1975) was selected as most appropriate (see Orwin, 1982, for a fuller explanation of this process). In it, each correlation between predictors is disattenuated by the Spearman correction formula. Correlations between predictors and the criterion variable (in this case effect size) are corrected for the unreliability of the predictor only; unreliability in the criterion is ignored. Formally, the usual least squares regression model

$$B = (X'X)^{-1}X'Y,$$

becomes

$$B = (X'X - U'U)^{-1}X'Y,$$

where $U'U$ is the variance–covariance matrix of errors of measurement in the predictors. The errors in predictors are assumed to be uncorrelated, so $U'U$ is simply a diagonal matrix of error variances.

[3] This is not to suggest that intercoder correlations can or should be substituted routinely for kappas, because they will sometimes differ considerably. In general, the

Table 2

Standardized Regression Coefficients (β), Squared Semipartial Correlation Coefficients (sr^2), R Square (R^2), and Adjusted R Square ($\hat{R}^2$) for Reliability-Corrected Regression Runs: Dynamic Subclass (N = 245)

Variable	β/sr^2				
	Run 0	Run 1	Run 2	Run 3	Run 4
Diagnosis: neurotic, phobic, or depressive	−.24/.017	−.38/.029	−.26/.013	−.31/.017	−.35/.022
Diagnosis: psychotic	−.29/.036	−.33/.044	−.37/.051	−.32/.037	−.36/.048
Clients self-presented	−.15/.015	−.14/.014	−.31/.039	−.09/.004	−.11/.005
Individual therapy	−.14/.013	−.11/.006	−.05/.001	−.14/.008	−.16/.010
Client IQ	.07/.003	.16/.006	.11/.004	.13/.004	.14/.006
Client age[a]	−.08/.004	−.09/.006	−.07/.003	−.08/.004	−.09/.006
Internal validity	.07/.004	.15/.017	.09/.004	.28/.031	.31/.039
Follow-up time[b]	−.09/.007	−.07/.005	−.05/.002	−.02/.000	−.03/.001
Outcome type[c]	.01/.000	.10/.005	.22/.018	.13/.007	.14/.009
Reactivity[d]	.24/.044	.43/.106	.49/.121	.52/.130	.59/.166
R^2	.16	.23	.26	.26	.34
$\hat{R}^2$	.12	.20	.23	.23	.31

[a] Transformed age = $(\text{age} - 25)(|\text{age}-25|)^{1/2}$. [b] Transformed follow-up = $(\text{follow-up})^{1/2}$. [c] "Other" category removed for purpose of dichotomization. [d] Transformed reactivity = $(\text{reactivity})^{2.25}$

The first attempt to perform the runs yielded unstable solutions; essentially, the reliability corrections were exacerbating the multicollinearity already plaguing the original data. Therefore, the analysis was redone using a reduced model that excluded redundant predictors. Under these conditions, the performances of the original and reduced uncorrected models were essentially equivalent.

Table 2 shows the standardized regression coefficients and squared semipartial correlation coefficients (sr^2) for each variable for each run, beginning with the uncorrected (i.e., original) run (Run 0) for the dynamic subclass (see Orwin, 1982, for the complete set of tables from all classes and subclasses). Approximately twice per class and twice per subclass, on average, one or more sets of reliability estimates caused the sign of a predictor's coefficient from Run 0 to reverse. The implication of a sign reversal (when significant) is that interpretation of the uncorrected coefficient would have led to an incorrect conclusion regarding the direction of the predictor's influence on effect size.[4] In every run in every class and subclass, the reliability correction altered the ranking of the predictors in their capacity to account for variance in effect size, as assessed by sr^2. Predictors showing promise in the uncorrected run often proved spurious when corrections were put in place; conversely, others were unremarkable [illegible] the uncorrected runs but relatively impressive in corrected runs. Internal validity is a case in point. In all classes and all but one subclass (humanistic), its sr^2 ranking relative to the other predictors increased from Run 0 to Run 4. In the verbal class this increase was by five—from seventh to second. In two classes and two subclasses, only reactivity of outcome outperformed internal validity. In one subclass (cognitive), internal validity outperformed all predictors by a wide margin, with 5.5% and 7.1% vari-

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reliability estimate selected for a variable should be based on its appropriateness for that variable's measurement level, and any interchangeability must be justified empirically.

[4] If the model is incorrect, even the corrected coefficients may lead to an incorrect conclusion regarding the direction of the predictors' influence on effect size. For the sake of the current demonstration, the original Smith et al. model is assumed to be correct, but the assumption may be erroneous.

ances uniquely accounted for in Runs 3 and 4, respectively.

Also shown in Table 2 is the *R* square and adjusted *R* square for each run. Across classes and subclasses, these tended to increase monotonically with run number (the single exception was in the humanistic subclass). The trend simply confirms the conservative to liberal progression built into the analytic design; of greater interest is the *amount* of increase. For classes, the relative increase in *R* square across runs ranged from 50% to 129%; for subclasses, this range was 14% to 150%. For classes, the grand mean increase over all runs was 76%; for subclasses, 72%. Even using the most conservative corrections (Run 1), mean increases hovered around 50%.

Confidence Judgments

Empirical distinctness from reliability. It was noted earlier that confidence judgments provide a more direct link with reporting quality than does interrater agreement. Before presenting results for specific confidence predictions, it will be useful to show that this conceptual distinctness is supported by an empirical distinctness.

We computed agreement rates by level of confidence for the 20 variables to which confidence judgments were applied over the 126 cases in File 2. The results showed that interrater agreement is neither guaranteed by high confidence nor precluded by low confidence. Yet they leave little doubt that confidence and agreement are associated. We also rank ordered the variables by the proportion of cases in which confidence was judged high. The correlation between the confidence rankings and the reliability rankings fell far short of perfect, regardless of the reliability estimate selected. In sum, the conceptual distinctness between reliability and confidence was born out empirically as expected.

Variation in confidence across items. We calculated the proportion of high, medium, and low confidence judgments for each item to which confidence judgments were applied over the 126 cases in File 2. High confidence proportions ranged from 1.00 for comparison type and location down to .09 for therapist experience. Eight items were guess-free (i.e., never received low confidence ratings), and one—therapist experience—was guessed almost half the time.

Variation in confidence across studies. We examined the per study proportions of high, medium, and low confidence judgments over the 20 variables to which confidence judgments were applied. The proportion of variables coded with certainty or near certainty ranged from 52% to 83%. At the opposite pole, the proportion of guesses ranged from 25% to 0%. Although sizable, these ranges understate the true variation in microlevel reporting quality over the area. Specifically, they ignore the fact that the set of well-reported variables may differ considerably across studies.

Effect of confidence on reliabilities. For Files 1 and 2, respectively, reliability estimates were calculated under three conditions: (a) all cases included, (b) only high and medium confidence cases included, and (c) only high confidence cases included. Conditions b and c are progressively restrictive on the reporting quality of included data. In File 1, confidence was uniformly high in three variables (thereby rendering all three conditions identical). In 13 of the remaining 17, all applicable reliability measures increased monotonically (nonstrictly) over the three inclusion conditions. In two more (15 of 17 altogether), at least one measure of reliability increased. Those that decreased did so by small amounts. The picture was almost identical in File 2.

Further examination revealed that the size of the increases was not trivial. Over the full set of variables (K = 20), which includes those in which confidence is invariant (these obviously deflate the mean), the mean agreement rate increased .08 (.74–.82) in File 1 when low- and medium-confidence cases were screened out. Over variables for which confidence was nonconstant (K = 17), the mean agreement rate increased .10 (.73–.83); and over variables for which confidence varied over the full range (K = 11), the same increase was .12 (.66–.78). The equivalent figures from File 2 are .10 (.82–.92, K = 20), .13 (.79–.92, K = 18), and .15 (.76–.91, K = 12), respectively. When each level of confidence is isolated, the increases are more striking. In File 2, for example, the mean agreement rate for high-confidence cases more than *dou-*

bled that for low-confidence cases (.92 vs. .44, K = 12).

Effect of confidence on relations between variables. First, correlation matrices were produced from each coder's data of all nonnominal variables in File 1. Next, for each bivariate pairing, each case in which one or both variable values had not been recorded with high confidence was removed. Note that such cases still remained in the computation of other correlations between variables on which their confidence ratings were high. For example, a case that received high confidence ratings on client age and blinding and a medium rating on therapist experience would be excluded from the computations of the age–experience and blinding–experience correlations but not from the age-blinding correlation.

In the high-only matrices, a few correlations could not be computed due to drastically reduced *N*s. Removing these left 50 usable correlations from Coder 0's data and 49 each from Coder 1's and 2's data. Of Coder 0's 50 correlations, 41 (82%) increased in absolute value when low and medium cases were removed. The sign test for matched pairs (Siegel, 1956) revealed this rate of increase to be significantly higher than expected by chance ($Z = 4.38, p < .01$). Moreover, all nine of the correlations with effect size increased. The special importance of these should be self-evident; the relations between study characteristics and effect size were a major focus of the original study (and is in meta-analysis generally). In Coder 1's data, 36 of the 49 (73%) correlations increased in absolute value; in Coder 2's, 35 of 49 (71%) increased. Neither proportion was significantly smaller than Coder 0's (for Coder 1, $\chi^2(1, N = 49) = 1.23, p > .20$; for Coder 2, $\chi^2(1, N = 49) = 2.40, p > .10$ by McNemar's, 1947, test for differences between correlated proportions), yet both were significantly greater than expected by chance (for Coder 1, $Z = 3.08, p < .01$; for Coder 2, $Z = 2.80, p < .01$). In correlations with effect size, six out of nine increased for each coder.

Magnitude of change was also examined. In Coder 0's, Coder 1's, and Coder 2's data, the absolute values of correlations increased by an average of .15 (.21–.36), .14 (.18–.32), and .12 (.19–.31), respectively. In relative terms, these are increases of 71%, 77%, and 63%, respectively. Recall that these cover all correlations, including those 18% to 29% that decreased. In sum, the strength of bivariate relations tended to increase, the increases were practically significant (i.e., nontrivial), and the effect generalized to all three coders.

Time-of-Task Side Study

The confidence ratings increased the overall time-of-task by an average of approximately 3%. These results are not surprising given the structure of the coding process. The time-consuming parts are reading the study (particularly with dissertations) and determining the appropriate comparisons, outcome measures, and method for calculating effect size. Effect size calculations can be quite time consuming if analysis of variance (ANOVA) tables must be reformulated to extract appropriate standard deviations or if complex approximations are required. Confidence ratings are simple by comparison; the coder will implicitly know when something is certain or when guessing, and the confidence rating simply records this.

The time-of-task side study did not include the generation of reliability data. In the present study, the requirement that both coders code all 25 studies approximately doubled the time required to code them. In an actual meta-analysis, however, only a sample of studies would need double coding. In a meta-analysis the size of Smith et al.'s (1980), the double coding of 25 representative studies would increase the total number of studies coded by only 5%. Therefore, the generation of reliability data, like the generation of confidence data, is relatively cheap.

Summary and Conclusions

The present reanalysis confirmed the expected effects of both macrolevel and microlevel reporting deficiencies, as assessed with interrater reliabilities and confidence judgments. Reliabilities varied greatly across individual coding items and, when used to correct regression analyses for attenuation, shifted the relative importance of predictors and increased *R* squares notably. Confidence ratings varied greatly across items and studies, and they were consistently and strongly associated with both reliabilities and the strength of observed relations between variables. As a whole, the results suggest that deficient reporting injects considerable noise into meta-analytic data which can lead to spurious conclusions regarding causes of effect size, adequacy of models, and related matters.

We conclude that there are at least three ways in which meta-analysts can counter effects of deficient reporting. First, coder reliability can be taken more seriously. As argued earlier and demonstrated by the present reanalyses, separate reliability coefficients for individual coding items, based on appropriate estimators, are much more informative and useful than the commonly used overall agreement rate. Coding conventions can improve reliability but at the risk of altering the meaning of items, and they must be used cautiously.

Stock et al. (1982) performed a systematic assessment of interrater reliabilities (agreement rates only) of individual items as part of a meta-analysis of the life-satisfaction literature. They described several tactics for improving interrater reliability in meta-analysis (e.g., rewrite the item, rewrite the instructions, hold training sessions) which are clearly useful toward that end. However, the only explanation offered for differences in agreement across items is that variables differ in coding complexity—differences in reporting quality are never suggested. Taking reliability seriously means more than assessing agreement rates and trying to bolster them. It also means picking up cues from each unreliable item about problems with the quality of the information that the item was created to tap.

Second, meta-analysts can rate data quality and incorporate data quality information into analyses. In the present study, a 3-point confidence scale was used to label the perceived accuracy of each data point recorded on the coding form. This proved to be a simple, fast, yet effective way to discern well-reported information from that which is not reported as well during subsequent analyses. Alternative indicators are of course possible. The problem cited earlier of decreased confidence due to coding ambiguities (rather than reporting ambiguities) is potentially soluble by using two confidence judgments—one rating confidence in the accuracy of the information and the other rating confidence in the coding interpretation applied to that information. More involved strategies might also be attempted, particularly if information is being sought from multiple sources (see Janda, 1970).

Third, meta-analysts can consider alternate sources of information. Some meta-analysts have attempted to obtain additional information on primary studies by going outside the reports. We have observed two strategies: contacting the original investigators and exploiting external information sources. An example of the first strategy is Hyde (1981). Rather than estimating approximate effect sizes from incomplete information, Hyde wrote and queried the authors. Of 53 studies, 18 (34%) lacked means and standard deviations. Although all 18 authors were located and contacted, only 2 were willing and able to supply the information. Further, the successful contact rate may have been atypically high because Hyde's area (cognitive gender differences) was relatively young. Also, the final success rate could have been still worse if more esoteric information than means and standard deviations had been sought. An example of the second strategy can be found in Smith et al. (1980). When the experimenter's affiliation was not evident from the report, Smith et al. consulted the American Psychological Association directory. In our reanalysis, we attempted to get reliabilities of outcome measures (an additional methodological variable) from the *Mental Measurements Yearbook* (Buros, 1938–1978) with generally unsuccessful results. Both of these strategies are necessarily limited; the first because the odds of success will typically be low; the second because the proportion of variables that are potentially retrievable from external sources will typically be small. Still, meta-analysts should keep them in mind because instances will surely arise in which their use is warranted.

Another source of information, if obtainable, is the raw microdata from primary studies. The use of microdata is not routinely applicable, particularly with a large number of studies, yet it is a potentially powerful addition that to date has been underexploited (see Cordray & Orwin, 1983). Its particular relevance to reporting quality is self-evident. Light and Smith (1971) focused on the integration of microdata to resolve apparent contradictions. The method they suggested is as follows: Data from the set of studies are pooled and reclassified into the smallest natural units of the treatment or program process, which are called clusters. Clusters are then tested for a variety of differences. If none are found, all are combined; if one or more are found, a search for explanations ensues. If the explanatory variables are identified, their influence is adjusted out (when possible) and clusters combined; if they are not identified or are identified but cannot be removed, clusters cannot be combined. Light and Smith's methodology is highly flexible and continually gets high marks from writers on meta-analysis (e.g., Cooper, 1979; Glass, 1976; Jackson, 1980), but has been used infrequently in practice.

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Appendix

List of Recoded Psychotherapy Studies

Pilot Sample

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Validity generalization: Some critical remarks on the Schmidt–Hunter procedure[*]

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This article presents some critical comments on the validity generalization procedure which has been presented by Schmidt, Hunter and others. They have put forward a method for testing the hypothesis that the variance in validity coefficients across situations for job–test combinations is due to what they consider to be statistical artifacts. The Schmidt–Hunter approach is criticized on the following points: the compilation of validity data, the use of criterion measures, and the test of the hypothesis of no situational specificity. Further, the relation between the concepts 'situational specificity' and 'validity generalization' is considered. In addition, it is noted that Schmidt, Hunter and others have defined the concept 'situation' in a different way than classical writers. It is concluded that the Schmidt–Hunter approach to validity generalization shows fundamental shortcomings. As a consequence their far-reaching conclusions for the practice of personnel selection should be considered premature.

One of the most remarkable developments in the area of personnel selection during the last few years is the work of Schmidt, Hunter and others (Schmidt & Hunter, 1977; Schmidt *et al.*, 1979; Callender & Osburn, 1980; Pearlman *et al.*, 1980; Schmidt *et al.*, 1980; Callender & Osburn, 1981; Schmidt *et al.*, 1981*a*; Schmidt *et al.*, 1981*b*; Schmidt & Hunter, 1981; Schmidt *et al.*, 1982; Osburn *et al.*, 1983) on the topic of validity generalization. Especially from the studies of Ghiselli (1959, 1966, 1973) we know that for a specific type of test applied to a particular type of job the validity coefficients from different samples show considerable variation: in one sample the validity coefficient may be high and positive and in another it may be even negative (see Fig. 1).

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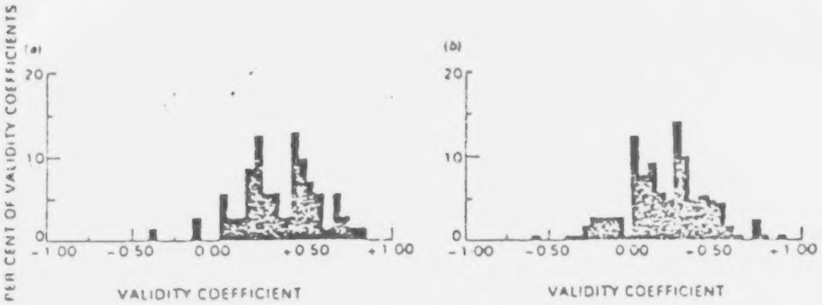

Fig. 1 Examples of variation in validity coefficients of given tests for particular jobs. (*a*) 72 coefficients for general clerks on intelligence tests, proficiency criteria; (*b*) 191 coefficients for bench workers on finger dexterity tests, proficiency criteria
Source: Ghiselli, (1966), p. 29

Ghiselli, commenting on this phenomenon, remarks that to some extent this variation results from sampling error. However, in considering studies with an *n* of at least 100, he concludes '... the variation among the reported validity coefficients for a given test applied to workers in a given job cannot be entirely explained on the basis of sampling error from some population average' (Ghiselli, 1959, p. 398). In his view, much of the variation results from differences in the nature of and the requirements for nominally the same job in different organizations, and in the same organization from one time period to another. On the basis of this kind of findings it has become an accepted rule that in each setting a separate validity study is necessary. This implies that the validity of a test for a given job cannot be generalized from one setting to another. In the case of different jobs, a test valid for one job may be invalid for another job, or may have a different validity.

Schmidt, Hunter and others heavily challenge these notions and put forward a method for testing the hypothesis that the variance in validity coefficients across situations for job–test combinations is due to what they consider as statistical artifacts. Using this method in their research they arrive at far-reaching conclusions (Schmidt & Hunter, 1981), e.g. 'professionally developed cognitive ability tests are valid predictors of performance on the job and in training for all jobs in all settings' (p. 1128), 'there is no factual basis for requiring a validity study in each situation' (p. 1133), 'there is no empirical basis for requiring separate validity studies for each job, tests can be validated at the level of job families' (p. 1133), and (Schmidt *et al.* 1981*a*): 'Our results indicate that such molecular job analyses, so heavily emphasized in personnel selection research in recent years, are unnecessary in practice. Instead, much broader methods, such as those that permit the grouping of jobs on the basis of their broad content structure or their similarity in inferred ability requirements without reference to specific tasks, duties, or behaviors are the most appropriate and powerful techniques' (p. 175), 'the only function of multiple criterion scales is to increase the reliability of the composite (overall) criterion measure' (p. 175), 'The fact that large task differences between jobs do not moderate test validities (or do so only to a small extent) suggests that other hypothesized moderators are unlikely to be important. Examples include organizational climate, management philosophy or leadership style, geographical location; changes in technology, product, or job tasks over time; age, socioeconomic status, and applicant pool composition' (p. 176).

These conclusions imply a rather drastic change in the way of looking at important issues in personnel selection. The goal of this article is to criticize the approach of Schmidt

& Hunter on some points and to see whether their alleged implications for the practice of personnel selection are tenable.

The validity generalization procedure which is presented by Schmidt, Hunter and others recognizes eight potential sources of variance in distributions of observed validity coefficients for given test–job combinations (see e.g. Schmidt *et al.*, 1979, p. 277; Schmidt *et al.*, 1980, p. 656):

$\sigma^2_{\bar{e}1}$ = Error variance due to sampling error, that is, variance due to use of $n < \infty$.

$\sigma^2_{\bar{e}2}$ = Error variance due to differences between studies in criterion reliability.

$\sigma^2_{\bar{e}3}$ = Error variance due to differences between studies in test reliability.

$\sigma^2_{\bar{e}4}$ = Error variance due to differences between studies in degree of range restriction.

$\sigma^2_{\bar{e}5}$ = Error variance due to differences between studies in amount and kind of criterion contamination and deficiency (Brogden & Taylor, 1950).

$\sigma^2_{\bar{e}6}$ = Error variance due to computational, typographical, and data transcription errors (Wolins, 1962).

$\sigma^2_{\bar{e}7}$ = Error variance due to slight differences in factor structure of tests measuring the same construct.

σ^2_{ss} = Variance due to true differences in factor structure between criterion measures, that is, variance due to true situational specificity.

Their hypothesis is that $\sigma^2_{ss} = 0$, or alternatively stated, that $\sigma^2_{\mathrm{total}} - (\sigma^2_{\bar{e}1} + \sigma^2_{\bar{e}2} + \sigma^2_{\bar{e}3} + \sigma^2_{\bar{e}4} + \sigma^2_{\bar{e}5} + \sigma^2_{\bar{e}6} - \sigma^2_{\bar{e}7}) = 0$, where $\sigma^2_{\mathrm{total}}$ is the variance of the observed validity coefficients and the other terms are defined as above. It is evident that in the Schmidt–Hunter model ' situational specificity ' is defined as: the existence of differences in factor structure of the criterion. We prefer another definition of the term situational specificity, which is elaborated in the paragraph on the definition of the concept ' situation '. However, for the clarity of presentation we first follow the Schmidt–Hunter model. The basic question in the Schmidt–Hunter approach is whether the seven sources of error variance ($\sigma^2_{\bar{e}1}$ up to and including $\sigma^2_{\bar{e}7}$), or ' statistical artifacts ', account for the observed variance of raw validity coefficients for given test–job combinations.

COMPILATION OF VALIDITY DATA

In the first large-scale application of their procedure for testing the hypothesis that $\sigma^2_{ss} = 0$, Pearlman *et al.* (1980) developed a data-base of validity studies in the area of clerical occupations. Validity studies were classified according to test type and job category. Two types of criterion measures were used, overall job proficiency and training success.

To give an example, one cell of the test type/job category classification scheme in the Pearlman *et al.* study was verbal ability/DOT occupational groups 201–209. To get an impression of the broadness of this scheme to classify validity studies, it should be noted that the following job categories are included: 201 secretaries, 202 stenographers, 203 typists and typewriting machine operators, 205 interviewing clerks, 206 file clerks, 207 duplicating machine operators and tenders, 208 mailing and miscellaneous office machine operators, 209 stenography, typing, filing, and related occupations, not elsewhere classified. With regard to test type, each category contained different predictors (item types) considered as measures of that factor or test type. The verbal ability test type category included such item type categories as reading comprehension, vocabulary, grammar, spelling, and sentence completion. Within this particular test type/job category cell 215 validity coefficients referring to criteria of overall job proficiency were compiled, from published and unpublished studies. These data form the basic material for testing the hypothesis of no situational specificity.

At this point the following question is crucial: Do these 215 coefficients refer to the same predictor–criterion relationship? In other words, can these coefficients be considered as replications? The answer depends on the definition of the concept of predictive validity. On the one hand we would define this term as the linear correlation between a predictor variable X_i and a criterion variable Y_j observed in a sample of applicants P_k to a given job. On the other hand it may be defined as the linear correlation between a predictor construct ξ and a criterion construct η, of which X_i and Y_j are operational measures, in a population of applicants Π from which the sample P_k is drawn. The first type of validity is called *observed validity*, the second one may be called *theoretical validity*. Both types of validity have three defining terms: predictor, criterion and sample, respectively predictor construct, criterion construct and population (see Fig. 2).

The specification of the three defining terms is central to this discussion. Within a given sample the same predictor may show different validities for different criteria, just as different predictors may show different validities for the same criterion. Also the validity of a given predictor for a given criterion may be dependent on the nature of the sample. For example, the validity of a spatial ability test to an accident criterion may be different for a sample of rural high school drivers, adult suburban female drivers, metropolitan cab drivers, and interstate truck drivers. Thus, all three defining terms should be known in order for a validity coefficient to be correctly interpreted.

While predictors and predictor constructs can be defined directly by referring to psychological instruments and theory, the other defining terms cannot. Criterion and sample (or criterion construct and population) are defined with reference to a certain job within a company (or job type within a sector of industry). Productivity, quality, turnover, accident criteria can only be measured and interpreted if content and context of the job are known.

In fact it is possible to distinguish some more defining terms for the validity concept than we have mentioned, as for instance the time interval between the moment of predictor and criterion measurement (cf. Schmidt & Kaplan, 1971), the conditions of measurement (the way in which tests are administered, whether criterion ratings are generated by the same or different persons, etc.), and the specific working conditions leaving more or less room for individual characteristics to influence job performance (see, for example, Peters & O'Connor, 1980). For the sake of simplicity we leave these out of account however.

The two types of validity may be seen as related, provided that certain general assumptions are fulfilled. X_i and Y_j should be adequate operationalizations of ξ and η and P_k should be a random sample from Π. We have summarized this in the structural model of Fig. 2. The relationships between X_i and ξ and Y_j and η may be thought of as factor loadings. It should be noted that specific psychometric models for describing the relationships may be set up, which may require specifications of these general assumptions and bring along other assumptions as well. For instance classical test theory assumes error and true components of observed scores to be independent.

The psychometric model adopted by Schmidt *et al.* rests on assumptions from classical test theory (Schmidt *et al.*, 1982, p. 836). Within the model the true test score T_X takes the place of the predictor construct ξ while the true criterion score T_Y stands for the criterion construct η. In this way the constructs are given a very narrow meaning: they cover only one test and one criterion instrument. As a result the theoretical validity has a limited meaning also. It is the population correlation between the true score components of the specific test and the criterion instrument. Schmidt *et al.* speak of observed and "true validity".

The true scores T_{X_k} of individuals $1 \ldots k \ldots H$ represent the parts of the test scores X_k that can be measured with perfect reliability. The relationship between the observed

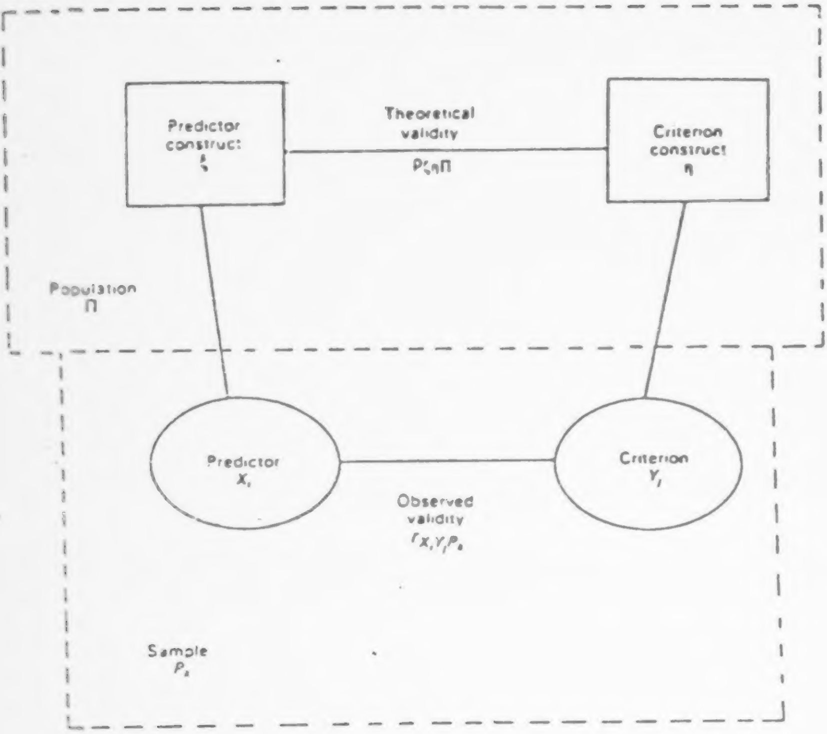
Predictor construct ξ
Theoretical validity $\rho_{\xi\eta\Pi}$
Criterion construct η
Population Π
Predictor X_i
Criterion Y_j
Observed validity $r_{X_iY_jP_s}$
Sample P_s

Fig. 2. Structural model for validity generalization.

score and the true score of subject h is described by the following basic equation from classical test theory:

$$X_h = T_{X_h} + E_{X_h}, \tag{1}$$

in which the error component E_{Y_h} is independent of T_{X_h}. The same holds for the criteria:

$$Y_h = T_{Y_h} + E_{Y_h} \tag{2}$$

The theoretical validity is conceived as the true-score correlation

$$\rho_{T_XT_Y} = \frac{\operatorname{cov}(T_X T_Y)}{\sigma(T_X)\ \sigma(T_Y)}, \tag{3}$$

within a given population. In 'empirical terms' this is the validity of test X against criterion Y that would be observed if:

sample size were infinite (i.e. sampling error were zero),
criterion reliability were perfect,
test reliability were perfect,
range restriction were absent,
(cf. Schmidt *et al.*, 1979, p. 266).

The model used by Schmidt *et al.* could be described as a *single-test-single-criterion-model*. It allows generalizations from a series of observed validities of a specific test-criterion combination to future observations of the same validity in other samples from the population. However, Schmidt *et al.* have never used the model in this way. Instead, they have used it incorrectly and without raising the question of the model's robustness, for generalizing from validities with varying test, criterion, and sample referents to future validities of any type. In our view, generalizations of the type that Schmidt *et al.* have aimed at would require another model. For instance, a model linking theoretical to observed validity might be formulated as follows. Suppose X_1 and X_2 are indicators of the same latent predictor construct ξ, thus being 'congeneric' tests. Specifically the relationship between ξ and X_i might be formulated as a *linear* model.

$$X_i = \beta_i \xi + \delta_i, \tag{4}$$

in which β_i is the loading of test X_i on factor ξ and δ_i is the residual part of X_i that cannot be explained by ξ. Not only should the predictor tests $X_1, X_2, \ldots, X_M$ be indicators of the same predictor construct ξ, this should also hold for the criterion measures $Y_1, Y_2, \ldots, Y_N$; the latter should be indicators of the same criterion construct η if it is assumed that all observed validities $r_{11}, r_{22}, \ldots$ stem from the same theoretical validity. The relationship between the criterion construct and its indicators might again be represented by a linear model.

$$Y_j = \gamma_j \eta + \epsilon_j \tag{5}$$

Equations (4) and (5) formulate a model of 'linear structural relations' with both observed and unobserved variables. In principle, the unknown regression coefficients β_i and γ_j can be estimated, e.g. by means of the computer program LISREL (Joreskog & Sorbom, 1978), provided sample size is large enough and certain assumptions are fulfilled. To apply LISREL, $r_{X_1Y_1}$ and $r_{X_2Y_2}$ should be computed over the same sample however, that is $r_{X_1Y_2}$ and $r_{X_2Y_1}$ should be known as well. In the Schmidt *et al.* procedure this is not the case.

Let us return now to the example from the Pearlman *et al.* (1980) study. The 215 coefficients in the verbal ability/DOT occupational groups 201–209 cell refer to several types of verbal tests and to different jobs in different organizations and may relate to different criterion constructs and applicant populations. In the light of the notions on observed and theoretical validity that we have put forward, it is far from evident that the 215 coefficients form a homogeneous collection of data. It is obscure to what notions the conclusions will refer; and which facet is generalized across.

Schmidt & Hunter suggest that the problem of classification is kept under control by their 'test of situational specificity'. However, the test of situational specificity is not suitable for detecting 'errors of classification'. The test is only dependent on the variance that exists within a set of numbers (validity coefficients) which, by definition, range from −1.00 to +1.00. It is easy to imagine a situation where the Schmidt-Hunter procedure could lead to absurd results. Suppose the validity coefficient between an intelligence test for children and the speed of learning some task is 0.40; suppose further that the validity coefficient between some spatial relations test and correct navigation in a sample of jet pilots is 0.40 too. Compiling these two coefficients and more coefficients of about the same size and then performing the Schmidt-Hunter computational procedures could lead to the conclusion that $\sigma_{ss}^2 = 0$. This outcome would imply that validity is generalizable, i.e. that we could use the intelligence test for children to predict the navigation score for jet pilots. This example shows that one may not rely on the Schmidt-Hunter procedures in checking the classification of validity data. Rather, the classification should be based on strict *a priori* rules, if one is to make sure that they do indeed refer to the same predictor-criterion relationship. We feel that Schmidt, Hunter and others have paid too little attention to this point. They have not really compared validity coefficients on their defining terms

USE OF CRITERION MEASURES

In testing their general hypothesis, data were collected only from studies that met certain requirements (Pearlman *et al.*, 1980). Data from studies using such criteria as turnover, absenteeism, and tardiness were excluded, and only criteria in terms of either job proficiency or training success were included. In studies that reported test validities for several criterion dimensions and an overall or summary criterion, only the coefficient for the overall or summary criterion was recorded. For cases similar to this, with no overall or summary criterion, the average validity for the several dimensions was recorded, and the product of the original sample size and the average number of dimensions was taken as sample size. Also, in later publications (Schmidt *et al.*, 1980; Schmidt *et al.*, 1981*a*; Schmidt *et al.*, 1981*b*; Callender & Osburn, 1981) only validities reported for overall job performance or overall training success were used. Partial measures (e.g. ratings on specific dimensions of job performance) were excluded. When job performance was measured by means of several specific dimensions, the composite (sum or average) of these specific criteria was taken as the measure of overall job performance.

The exclusive use of overall criterion measures deserves at least three critical remarks:

(*a*) Schmidt & Kaplan (1971) demonstrate that ceilings on validity are lower when either the criterion or the predictor is homogeneous, while the other is heterogeneous. Smith (1976) underlines the same point when she states that whenever possible the relative degree of specificity in a manipulation or predictor should be matched to the specificity of the criterion measure. In most of the studies testing the Schmidt–Hunter procedure the predictors in the validity studies seem to be far more specific than the overall criterion measures used. This leads to the effect of lower ceilings on validity, so that the variance of the distribution of raw validity coefficients will be smaller than in the case where coefficients referring to specific dimensions of job performance would have been used. This favours the hypothesis of no situational specificity ($\sigma^2_{ts} = 0$).

(*b*) Most measures of job proficiency (see e.g. Schmidt *et al.*, 1981*a*) were supervisory ratings. From the literature (e.g. De Wolff, 1970) it is well known that ratings may reflect for a major part the personal feelings of the rater, or in the words of Vernon: 'there is a strong tendency to evaluate people along the single dimension of how they affect us, and to assume egocentrically that most of their actions are directed towards helping or hurting us' (Vernon, 1964). Thus, with such kind of criteria the validity coefficients may reflect the relations between predictor tests and sympathy for the ratee. This would lead to little variance in the distribution of raw validities because of the global, undifferentiated, character of ratings.

(*c*) The possibility of the multidimensionality of criteria is neglected. Even stronger, Schmidt *et al.* (1981*a*) deny multidimensionality of criteria: '. . . only a measure of overall job performance is needed in validity studies . . . the only function of multiple criterion scales is to increase the reliability of the composite (overall) criterion measure . . .' (p. 175). However, studies involving statistical analyses of sets of criterion measures rarely yield a single general factor. Smith (1976) presents a great number of studies as evidence against the argument that unreliability contributes to the 'apparent' complexity of criteria.

TESTING THE HYPOTHESIS OF NO SITUATIONAL SPECIFICITY

Though we have argued that testing for validity differences in a test type/job category can easily lead to conceptual problems, let us follow Schmidt, Hunter and others. Their hypothesis is that the variation in true validities for given job–test combinations is essentially zero (Schmidt & Hunter, 1977, p. 530). How is this operationalized into a statistical test? The most direct way would be to test whether the true validities that remain after undoing the raw validities from artifacts are equal to each other. This would lead to a statistical test of

$$H_0 : \rho_1 = \quad = \rho_k.$$

with the alternative that one or more ρs are different. It is known that such a test is quite sensitive to departures from H_0, and has a high power in detecting true differences when that is the case. Schmidt, Hunter and others do not pay attention to this statistical method. Instead, they give a method to compute the residual variance σ^2_{ρ} and the mean of $\rho_1, \ldots, \rho_k$. The null-hypothesis is then operationalized as: H_0: $\sigma^2_{\rho} = 0$, against H_1: $\sigma^2_{\rho} > 0$.

It should be noted that this is a *univariate hypothesis*, in contrast to the *multivariate hypothesis* $H_0: \rho_1 = \ldots = \rho_k$, that would be called for. This is an important observation, because change from a multivariate to a univariate procedure generally drops the power to detect real differences, and hence 'favours' the null-hypothesis. Now in the Schmidt–Hunter procedure the null-hypothesis is the *hypothesis of interest*. This means that in cases of relatively small differences in validity the Schmidt–Hunter statistical procedure could wrongly lead to the conclusion that situational specificity is absent. Recently, Osburn *et al.* (1983), using Monte Carlo simulation techniques, have demonstrated that the power of the Schmidt–Hunter procedure is low, and actually decreases as the number of validity studies increases in generalization studies with small sample size and/or the variance of the true validities is low to moderate.

Sound statistical methodology would approach the multivariate null-hypothesis formulated above with some homogeneity of correlations test (Hays, 1973; Kraemer, 1979; Viana, 1980). Existing tests, however, only deal with sampling error, and the effects of the standard errors of the correlations due to unreliability of predictor and criterion, and of range restriction have not yet been worked out. It is known that the sampling variance of a correlation corrected either for unreliability (attenuation) or range restriction is larger than the sampling variance of the uncorrected correlation (Bobko & Rieck, 1980). In general, tests based on uncorrected coefficients will be more powerful than tests based on coefficients corrected either for attenuation or for range restriction when sample size is lower than (about) 100 (Bobko & Rieck, 1980, p. 393). In the validity generalization study of Pearlman *et al.* (1980) mean sample size, of over 3000 validity studies, was 68. Callender & Osburn (1981) indicate that the large sample results of Bobko & Rieck might be used to obtain the sampling variance of correlations corrected for all artifacts. As we have argued above, we would prefer to tackle the problem of classification by using *a priori* rules, instead of a 'test of situational specificity'. But if a test is to be put forward, as in the Schmidt–Hunter approach, then a multivariate test should be used. In principle it is possible to derive a homogeneity test. A correct Bayesian approach would lead to a test of the type described by Box & Tiao (1973).

Another shortcoming is that when the hypothesis of no situational specificity is rejected, the Schmidt–Hunter overall test does not give any diagnostic information concerning the coefficient(s) responsible for this outcome. It remains unknown which coefficient(s) should be removed in order to make the remaining set of validities suitable for generalization.

A final limitation inherent in the Schmidt–Hunter procedure is that the Type I and Type II error rates for their 'statistical test' are not known and therefore may not be con- estimate of σ^2_{ρ} arose because of real differences in true validities or because sampling variation in the observed correlations just happened to produce a highly variable set.

Apart from the points mentioned before, the Schmidt–Hunter procedure for testing situational specificity should be criticized for the decision rule that is adopted for 'testing' the hypothesis that $\sigma^2_{\rho} = 0$. In the Schmidt–Hunter procedure a residual variance is computed for the purpose of determining whether the observed variation in sample correlations could have resulted from a number of artifacts. This is done by calculating a point estimate of the residual variance (σ^2_{ρ}). As the variance of σ^2_{ρ} is unknown, it is impossible to derive a statistical test for H_0: $\sigma^2_{\rho} = 0$, against H_1: $\sigma^2_{\rho} > 0$. Instead, the convention is adopted that the hypothesis of no situational specificity is accepted when at least 75 per cent of the variance in the observed validity distribution is accounted for by the first four artifacts (σ^2_e, up to and including $\sigma^2_{\epsilon 4}$). The rationale for this decision rule is that the remaining artifacts ($\sigma^2_{\epsilon 5}$ up to and including $\sigma^2_{\epsilon 7}$), for which no corrections are made, are likely to account for at least 25 per cent of the observed variance. We feel that this last line of argument is rather uncommon in statistics. Even stronger objections can be made against the logic of the model as such: testing the hypothesis of no situational specificity by subtracting variance for different error sources from the observed variance in a validity distribution. In the Schmidt–Hunter procedure seven sources of error are distinguished, but more sources of error can easily be thought of. Ghiselli (1966), for example, mentions differences in the conditions under which tests are administered as a source that produces variation in validity. He presents data on the influence of different test administrators on the validity of a motor test for a technical job. When more sources of error are invented and their variances estimated, the more likely will σ^2_{u} tend to become zero (or even take on a negative value). Therefore, there is an increasing chance that the hypothesis of no situational specificity will be accepted when more sources of error are taken into account. Logically speaking, as the power of the procedure approaches zero, the more error sources are added.

We conclude that the 'test' in the Schmidt–Hunter procedure is not adequate. We would prefer other, more powerful, tests. An even better approach would be to test the hypothesis of no situational specificity with an experimental design, i.e. by changing tasks experimentally and studying effects on the observed validities. In a series of experiments Burkhardt *et al.* (1978) have shown that changes in the task and work environment have effects on the strength of predictor–criterion relationships. In our view, this alternative approach would tackle the notion of situational specificity more directly.

SITUATIONAL SPECIFICITY AND VALIDITY GENERALIZABILITY

The Schmidt–Hunter procedure for generalizing validity proceeds as follows. After correcting the mean of the distribution of raw validity coefficients for attenuation due to criterion unreliability and for range restriction, and after properly calculating the standard deviation, it may become apparent that a very large percentage, say 90 per cent, of all values in the distribution lie above a 'minimum useful level' of validity. In such a case, according to Schmidt, Hunter and others, one could conclude with 90 per cent confidence that true validity lies at or above this minimum level in a new situation involving this test type and job, *without carrying out a validation study of any kind*. All that would be required in their procedure is sufficient job analysis information to ensure that the job in question is indeed a member of the occupation or job family on which the validity distribution was based.

Although situational specificity and validity generalization are mentioned in the same breath, especially if one looks at the general hypothesis, it appears that these two concepts are more loosely coupled than one would conclude at first impression. Schmidt *et al.* (1979) state that in the case that the hypothesis of no situational specificity is accepted validity generalization is obviously no longer a problem. But they state also that validity generalization can be justified in many cases in which the hypothesis of no situational specificity cannot be definitively rejected. In more recent publications (e.g. Schmidt *et al.*, 1982, p. 841) the two concepts seem even more detached: 'It is important to note that the situational specificity hypothesis is not the same as the hypothesis that validity is generalizable', and 'Obviously, from the point of view of immediate practical applications, the question of validity generalizability is more important than the question of situational specificity'.

Because Schmidt, Hunter and others do not define the concept of validity precisely, as we have argued above, it is not completely clear what meaning they assign to the term validity generalization. It is evident that they consider validity generalization as the process of inferring some type of ρ from series of rs, but it is not clear what type of ρ this is. There are no rules in their method to guarantee that the predictor and criterion variables are related to the same constructs or have the same true score components. In fact, Schmidt, Hunter and others seem to recognize that their method leaves room for *r*s corresponding to conceptually different ρs, when they state that the so-called residual variance of the validity distribution may reflect true criterion differences (e.g. Pearlman *et al.*, 1980).

For validity generalization one would need a statistical model, being dependent on conclusions drawn with regard to ρ. As far as we can see, Schmidt, Hunter and others distinguish between three types of conclusions:

Case I: The hypothesis of no situational specificity is accepted.
Case II: The hypothesis of no situational specificity cannot be definitively rejected.
Case III: The hypothesis of no situational specificity is definitively rejected.

In all these cases they consider it appropriate to generalize validities. Here three points of criticism are in order.

(*a*) No distinction is made between a model for the case in which the hypothesis of no situational specificity is accepted, and one for the case in which the hypothesis is not accepted. In both cases they derive a distribution of validities, the mean of which they regard as the best estimate $\hat{\rho}$ for future validity studies. However, inferences in the first case cannot be the same as those in the second case, thus causing suboptimal estimations. In our opinion, the estimation procedure should be dependent on the conclusion drawn with respect to validity homogeneity. When $\sigma^2_{ss} > 0$ this parameter should be included in the model, changing the confidence interval for $\hat{r}$.

(*b*) In their model they work with one distribution of validities, also in the case where more than one distribution would be called for. If the test of no situational specificity is rejected, one knows for sure that the unimodal distributions given in the Schmidt–Hunter approach must consist of at least two subpopulations, e.g. a mixture of two normals. Such a mixture cannot be distinguished from the reported results in the Schmidt–Hunter approach and therefore constitutes a rival explanation of their results. However, in case of a mixture of validity distributions, one does not know which subpopulation should be the basis for validity generalization. Consequently, the Schmidt–Hunter procedure would lead to either an under- or an overestimation of the 90 per cent minimum useful level.

(*c*) The model is incomplete, because there is no explicit transition of some estimated theoretical validity $\hat{\rho}$ to an estimate of future *r*s. In our view, in accordance with our model presented in Fig. 2, two phases of validity generalization should be distinguished (see Fig. 3):

1. deriving an estimate $\hat{\rho}$ of the theoretical validity from observed values of *r*;
2. deriving from this estimate $\hat{\rho}$ (or from a given true validity, i.e. ρ) an estimate $\hat{r}$ of the validity that is expected to be observed in a future validity study with the same referents as ρ.

We feel that this second phase, which relates theoretical validity to validities to be expected, should also be considered as a part of validity generalization. Without it, validity generalization would be of theoretical value only; it would not be of any use to the practice of personnel selection. As indicated, Schmidt, Hunter and others do not give explicit attention to this phase. However they do suggest that the theoretical validity may be considered as an estimate of the validity that may be observed in a new study, which is, generally speaking, not true. Both within a Bayesian and a 'classical' framework the future sample size should be taken into account. Furthermore, specific characteristics of the measurement instruments, like reliability and factor loading, should also be taken into consideration. In other words, the transition of $\hat{\rho}$ to $\hat{r}$ requires that, once again, the three basic assumptions relating observed validities to theoretical validities are given explicit consideration.

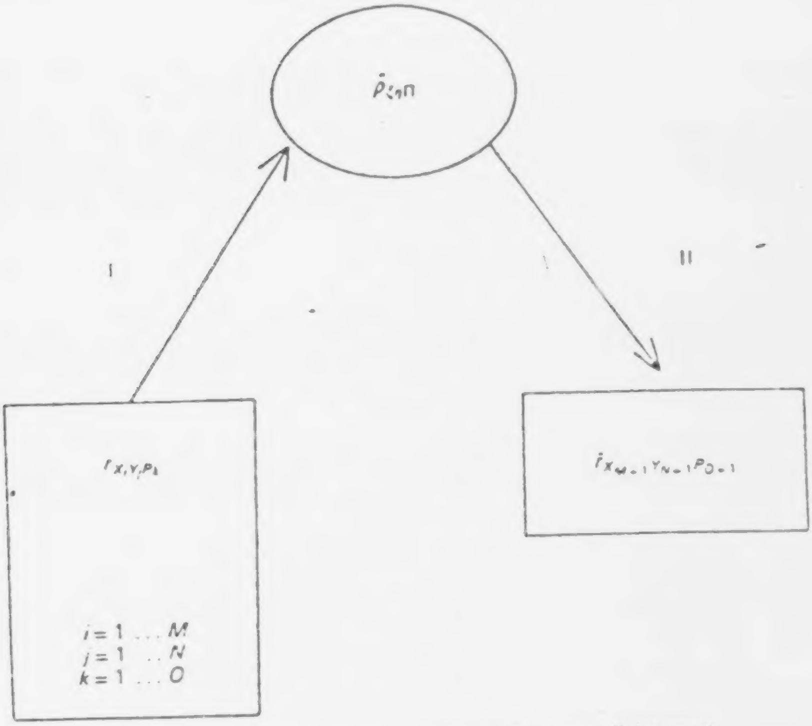

Fig. 3. The two phases of validity generalization (I inductive, II deductive)

THE DEFINITION OF THE CONCEPT 'SITUATION'

It is not easy to define the concepts 'situation' and 'situational specificity'. Following modern personality theory (e.g. Ekehammar, 1974, Magnusson, 1981) one would be inclined to define 'situation' as the whole of those factors that, without being tied in any way to the individual, help to determine his or her work behaviour. While some of these factors will operate in additive manner, some others may interact with personality traits, thus operating as moderators of the relationship between individual characteristics and work behaviour. Validities of tests measuring these characteristics would vary under the control of such factors and hence show 'situational specificity'.

In the classical literature on personnel selection the two concepts have a broader meaning. Ghiselli (1959) called test validities situation-specific when he noted that observed values, stemming from samples of applicants to the same jobs and relating to the same predictors, showed considerable differences, falling outside the range to be expected on the basis of sampling error. According to other authors (e.g. Lawshe & Balma, 1966), test validities are situation-specific by definition, because they bear on relationships of tests with specific job criteria established in specific samples. So it seems that for classical theorists 'situational specificity' has been roughly equivalent to dependence upon other factors than those used in the definition of validity (i.e. the referents), at their time being the predictor instrument (test) and a job title. At the same time 'situation' has covered the whole of these other factors, including the working conditions relevant for performance, the specific nature of criteria, sample size and composition, the time interval between predictor and criterion measurement, measurements characteristics like the manner of test administration, scoring accuracy, etc.

It should be noted that different kinds of factors are involved here:

1. behavioural determinants from 'outside the individual', mentioned above, such as restrictive working conditions or motivational contingencies;
2. factors having to do with the aspects of work behaviour that are being considered, like the content of the job, the dimensionality of performance, and the nature of the criterion instruments (including criteron contamination and deficiency);
3. factors that relate to the research design adopted for the validation study, like the time interval between measurements, unwarranted unreliability, restriction of range, etc.

Schmidt *et al.* have arrived at another view. Stating that the hypothesis of situational specificity holds that differences in validity for a given test–job combination are due to differences in the factor structure of job performance (Schmidt & Hunter, 1977; Schmidt *et al.*, 1979), they have introduced their own definition of 'situation'. In fact, they have limited it to the second category of those above, leaving out the first as well as the third. Some of the factors from this last category are explicitly mentioned as 'artifacts' by them. We feel that this nomenclature may bring confusion. For instance, in the case of an equal factor structure of global criteria and great artifactual effects on observed validities, Schmidt *et al.* would declare situational specificity to be absent, while other researchers would state that situational specificity was present.

We prefer to follow the traditional approach, and use the term situational specificity as a summary label for the fact that observed validities are dependent on factors not considered in defining the validity concept. At the same time, however, we suggest that a clear distinction be made between the three sources of situational specificity: external behavioural determinants, job and criterion characteristics, and design parameters (including 'artifacts'). Knowledge about the degree to which factors from these sources influence validities is highly desirable, because it may improve our understanding of work behaviour, work organization, and selection research methodology.

A final point to note is that the approach that we have chosen makes the concepts 'situation' and 'situational specificity' dependent on the definition of validity. More complete definitions, involving three or even more referents, will restrict the content of these concepts. When all moderating determinants, job-criterion factors and research design parameters are included in the definition of validity, 'situation' would become equivalent to sample size, and 'situational specificity' to sampling error for observed validities, while at the level of theoretical validities both terms would have no meaning whatsoever.

CONCLUSIONS

Our critical comments on the Schmidt–Hunter approach to validity generalization do not imply that their work is not relevant for the theory and practice of personnel selection. On the contrary, their ideas on the generalization of validity are very provocative and important for the development of personnel selection as a field of science. They were the pioneers in introducing the basic notions of Bayesian statistics into the field of validity research, so that results of preceding studies can be used to develop cumulative knowledge. They also emphasized that sample sizes required to produce adequate power in empirical validation studies are substantially larger than has typically been assumed; they renewed our attention for the effects of restriction of range and attenuation. However, the ways in which they have worked out their ideas on validity generalization show fundamental shortcomings, needing correction in the future. As a consequence, their conclusions should be considered as premature.

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Attended Stanford University Graduate School--two years in Department of Psychology.

Business Career:

1959 - Pacific Gas and Electric Company, performed a large number of test validation and other research projects.

1967 - Allstate Insurance Company, established and directed the Psychological Research Department at Allstate's Judson Branch Research Center. Developed an Employee Attitude Survey Program and initiated a test validation program.

1972 - Pacific Gas and Electric Company, established and now directs a corporate Personnel Research Section involved in a broad program of Personnel Research.

Memberships: Technical Advisory Committee on Testing to the California Fair Employment Practice Commission (TACT).

Member - 1964 (only charter member still active)
Officer since 1965

Chairman - December 1968 to December 1972

Steering Committee - since 1968

American Psychological Association, also member of Division 14 of the APA, the Division of Industrial and Organizational Psychology.

1974 - Appointed to the Division 14 committee which developed the Principles for the Validation and Use of Personnel Selection Procedures, published in 1975.

1977 - Appointed to the Division 14 Ad Hoc Committee on Legal Issues.

1978 - Appointed by the President of Division 14 to the Advisory Panel on Validation and Use of Personnel Selection Procedures to assist in the development of the second edition of the "Principles" which were published in 1980.

American Association for the Advancement of Science

American Society for Personnel Administration

IEEE Computer Society

Other: Appointed to Governor Reagan's Task Force in Sacramento, 1967. (Studied the examination system and other personnel functions of the California Personnel Board and developed recommendations).

Appointed by U. S. District Judge R. F. Peckham as the "court's expert in the field of psychometrics" in *N. A. A. C. P. vs. Civil Serv. Comm., S. F., 6 EPD 8956* (Now referred to as *Officers for Justice*)

Served as the testing expert to the Plaintiffs' attorneys in *Luevano* vs. *Devine* (referred to as the PACE case). Also appeared as a guest on the McNeil-Lehrer Report during a broadcast devoted to the PACE case.

Served as an advisor to the U. S. Department of Justice and to the Equal Employment Opportunity Commission on employee selection guidelines, 1973-1978.

Conducted seminars on EEO law and employment procedures at U. S. F. Law School, Golden Gate Law School, Stanford Law School, and Hastings College of the Law.

Mr. Martinez. Dr. Seberhagen.

Mr. Seberhagen. Mr. Chairman and members of the committee: Thank you for inviting me to testify today. I am Dr. Lance Seberhagen, a consultant in personnel management. My Ph.D. is in industrial organizational psychology from the University of Minnesota.

I have 17 years of professional experience in employee selection. My clients have included private corporations and all levels of government across the country.

I have also testified as an expert witness or provided technical assistance in nine court cases involving employee selection and three cases involving salary.

Although I am a member of various professional associations such as the American Psychological Association, the Society for Industrial and Organizational Psychology, which is also known as division 14 of the APA; and the Personnel Testing Council, I am not an official representative of these groups, and my comments today are entirely my own.

The central issue before the subcommittee is whether the uniform guidelines should be revised. This is a critical decision because the uniform guidelines and its predecessors have a good record of success. Therefore, any changes in the guidelines should be viewed with caution. If important aspects of the guidelines were weakened or eliminated, less test research would probably be done and the quality of employee selection procedures would probably deteriorate. The ultimate result would be not only more employment discrimination but also lower work force productivity.

The uniform guidelines represent the third or fourth generation of Federal guidelines on employee selection procedures for three of the four signatory agencies. Thus, much thought has been into this area, and the present guidelines are much better than previous guidelines. Of course, there's still room for improvement, but I could live with the present guidelines if I had to choose between them and a weaker set of guidelines.

On the other hand, if important aspects of the uniform guidelines could be retained, I would like to see further revision of the uniform guidelines to promote equal employment opportunity and to improve work force productivity through better employee selection procedures.

Now, what important aspects of the guidelines should be retained? First of all, the definition of selection procedure. The guidelines define selection procedure as any measure, combination of measures, or procedure used as the basis for any employment decision.

If the definition of selection procedure were artifically limited just to paper and pencil tests and performance tests, as some groups have proposed over the years, the guidelines would exempt the very types of selection procedures which have the least validity and which probably cause the most employment discrimination, such as interviews and minimum qualifications.

The second point would be reliance on professional standards. The guidelines should continue to give general reference to the testing standards, and I would also add, the Principles of the American Psychological Association and division 14, and this reference as needed to maintain the credibility of the guidelines because this is the only professional group that is established, technical standards on employee selection procedures. And they do have the recognized expertise.

Another point I would retain would be rejection of casual evidence of validity. There is no substitute for rigorous validation research. The guidelines should continue to reject assumptions of validity based on such things as the general reputation of a test or the test developer; promotional literature, or personal testimonials regarding the test.

The fourth point would be documentation requirements. The guidelines should continue to require appropriate documentation to ensure the proper use of any test. Key documents include a technical report to describe the development and validation of the test, and the second document would be an administrative manual to explain how to administer the test to examinees and score the results.

What changes should be made in the uniform guidelines? The 1985 edition of the APA Testing Standards contains no major changes which affect employee selection. Thus, the technical details of the guidelines do not need to be revised to maintain a consistency with the latest APA Standards. Even so, there are other changes that might be desirable, and this would be my wish list, if you will.

First of all, as far as general coverage, if the intent is to provide one uniform Federal policy for employee selection procedures under various Federal EEO laws, the guidelines should be revised to cover age, handicap, and all other Federal EEO requirements.

Second, the types of discrimination. The guidelines should go beyond adverse impact type of discrimination to say that the validity sections of the guidelines represent Federal policy whenever test validity or professionally developed tests would be at issue under Federal law. And this would be, for example, in cases of intentional discrimination or unequal treatment.

Third, as far as adverse impact, I feel that the guidelines should define adverse impact as a combination of statistical significance and the 80-percent rule to provide more reliable and meaningful measure for small samples.

Fourth, as far as validation, discrimination can occur when there is no adverse impact. The only solution for this problem is to require the validation of all employee selection procedures. One approach would simply be to have the standards of validation for all tests. Another approach would be to have two levels of standards with higher level standards for validation for those tests which have adverse impact.

In the area of job analysis, I feel that the guidelines should give greater recognition to the importance of job analysis in all validation studies, not just those based on content validity. No one method of job analysis is necessarily the best as long as it has good measurement properties. And these would be, for example, the validity, reliability, and fairness of the job analysis process.

Validity generalization is the topic that most people refer to when they talk about recent developments in the area of employee selection. And after combining data for many validation studies using cognitive ability tests, some researchers have concluded that professionally developed cognitive ability tests are valid predictors of performance for all jobs in all settings.

One implication of this might be that no further validation is needed as long as an employer uses a cognitive ability test.

I would not go that far because, first of all, the methods of validity generalization are still being defined. There has been little replication of this work by other researchers, and cognitive ability may be necessary but not sufficient for job success.

Validity generalization is a very important area but it would be premature to make radical changes in the uniform guidelines which would exempt employers from any further validation. Instead, the guidelines should provide more clarity and what evidence is needed for test transportability, and that's where a test that's validated at one location can be used in a second location. And except meta-analysis, which should be a broader averaging of validity results over many studies, except those types of studies, only when the domain of the studies is fully described and when the original studies being reviewed are properly done, fully documented, and available for review.

Finally, I would require evidence that all necessary worker characteristics are being measured in order to ensure job success. So the cognitive ability may not be the only necessary part of the selection process.

Thank you very much for this opportunity to testify. I will be happy to answer any questions you have.

[The prepared statement of Lance W. Seberhagen follows:]

PREPARED STATEMENT OF LANCE W. SEBERHAGEN, PH.D.

Introduction

Mr. Chairman and members of the Committee:

Thank you for inviting me to testify before the House Subcommittee on Employment Opportunities regarding the Uniform Guidelines on Employee Selection Procedures (EEOC, 1978). This is a topic of great interest to me, and I hope my comments are helpful to you.

I am Dr. Lance Seberhagen, a consultant in personnel management. My Ph.D. is in industrial/organizational psychology from the University of Minnesota, and I have 17 years of professional experience in employee selection. My clients have included private corporations and all levels of government across the country. I have also testified as an expert witness or provided technical assistance in nine court cases involving employee selection and three cases involving salary.

Although I am a member of various professional associations such as the American Psychological Association, the Society for Industrial and Organizational Psychology (a division of APA), and the Personnel Testing Council, I am not an official representative of these groups, and my comments are entirely my own.

Should the Uniform Guidelines be Revised?

The central issue before the Subcommittee is whether the Uniform Guidelines should be revised. This is a critical decision because the Uniform Guidelines and its predecessors have done more to educate employers and stimulate research in employee selection than all of the psychological textbooks and professional journals combined. Although some employers may have discontinued testing out of fear of the Guidelines, much of this testing was probably unvalidated and not worth saving anyway. At the same time, many other employers have begun conducting validation studies as a direct result of the Guidelines. Therefore, I believe that the net effect of the Guidelines has been a very positive one for the development and use of good employee selection procedures and, thereby, for the reduction of employment discrimination.

Given this record of success, any changes to the Guidelines should be viewed with caution. If important aspects of the Guidelines were weakened or eliminated, less test research would probably be done, and the quality of employee selection procedures would probably deteriorate. The ultimate result would be not only more employment discrimination but also lower workforce productivity. (See Appendix A for an explanation of "test utility" -- i.e., the value of employee selection procedures).

The Uniform Guidelines represent the third or fourth generation of federal guidelines on employee selection procedures for three of the four signatory agencies (see Table 1). Thus, much thought has been put into this area, and the present Guidelines are much better than previous guidelines. Of course, there is still room for improvement, but I could live with the present Guidelines if I had to choose between them and a weaker set of guidelines.

On the other hand, if important aspects of the Uniform Guidelines could be retained, I would like to see further revision of the Uniform Guidelines to promote equal employment opportunity and improve workforce productivity through better employee selection procedures.

What Important Aspects of the Uniform Guidelines Should be Retained?

1. Definition of "selection procedure." The Uniform Guidelines define "selection procedure" as: "Any measure, combination of measures, or procedure used as the basis for any employment decision." Examples of the wide range of assessment devices covered by this definition are shown in Table 2. This definition is consistent with professional standards and is realistic in terms of actual practice by employers. If the definition of "selection procedure" were artificially limited just to paper-and-pencil tests and performance tests, as some groups have proposed over the years, the Guidelines would exempt the very types of selection procedures which have the least validity and which probably cause the most employment discrimination (e.g., interviews and minimum qualifications).

2. Reliance on professional standards. The Guidelines should continue to reference the testing Standards published by the American Psychological Association (1985) and add a reference for the testing Principles published by the APA Division of Industrial and Organizational Psychology (1980) -- or the next revision of the Principles, which is due to be completed sometime in 1986. Although these professional standards have been somewhat politicized and are not perfect in every way, they do represent the most widely accepted statement of professional standards for employee selection procedures. A general reference to these publications would do much to maintain the credibility of the Uniform Guidelines. A general reference might also be made to the body of psychological textbooks and journals as another major source of professional standards, just to keep everyone honest.

3. Rejection of casual evidence of validity. There is no substitute for rigorous validation research. The Guidelines should continue to reject assumptions of validity based on such things as the:

Table 1

PRESENT AND PAST
FEDERAL GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Equal Employment Opportunity Commission

1. Uniform Guidelines on Employee Selection Procedures (1978).
2. Guidelines on Employee Selection Procedures (1970).
3. Guidelines on Employment Testing Procedures (1966).

Department of Labor, Office of Federal Contract Compliance Programs

1. Uniform Guidelines on Employee Selection Procedures (1978).
2. Federal Executive Agency Guidelines on Employee Selection Procedures (1976).
3. Employee Testing and Other Selection Procedures (1971).
4. Validation of Employment Tests by Contractors and Subcontractors (1968).*

Office of Personnel Management

1. Uniform Guidelines on Employee Selection Procedures (1978).
2. Federal Executive Agency Guidelines on Employee Selection Procedures (1976).
3. Tests and Other Applicant Appraisal Procedures (1972).*
4. Merit System Standards (1971, 1979).*

Department of Justice

1. Uniform Guidelines on Employee Selection Procedures (1978).
2. Federal Executive Agency Guidelines on Employee Selection Procedures (1976).

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* Required validity for all employee selection procedures.

Table 2

EXAMPLES OF EMPLOYEE SELECTION PROCEDURES*

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1. Minimum qualifications (e.g., education, experience, sex, age).
2. Biographical data forms and scored application blanks.
3. Ratings of training and experience.
4. Written tests of job knowledge, aptitude, and general intelligence.
5. Interviews and oral exams.
6. Work sample tests and simulation exercises.
7. Assessment centers and individual assessments.
8. Physical fitness tests (e.g., strength, agility, stamina).
9. Ratings of work performance and advancement potential.
10. Seniority and job tenure.**
11. Drug tests, medical exams, and genetic screening.
12. Reference checks and background investigations.
13. Job trials and probation periods.
14. Vocational interest inventories.
15. Personality inventories and projective techniques.
16. Honesty tests, polygraph tests, and voice stress analyzers.
17. Handwriting analysis.

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* For ease of presentation, all of these selection procedures are referred to as "tests" in my testimony.

** Exempt from coverage under Title VII but not other EEO laws.

- General reputation of a test or a Test Developer.
- Qualifications of a Test Developer.
- Descriptive label on a test.
- Promotional literature about a test.
- Frequency of test usage.
- Personal testimonials regarding a test.

4. Documentation requirements. At least two basic documents are necessary to ensure the proper use of any test. These documents include (1) a technical report to describe the development and validation of the test and (2) an administrative manual to explain how to administer the test to examinees and score the results. If not already covered, there should also be a document which gives an overview of the validity of the entire selection process, explaining the interrelationships among the various component tests and the role each component test plays in predicting future job success. In addition, if not already covered, there should be a general test administration manual to establish official testing policies and procedures which are applicable to all tests (e.g., organization of the testing function, testing equipment and facilities, standardized procedures, test security, release of test results, preservation of testing records).

What Changes Should be Made in the Uniform Guidelines?

The EEOC was proper in waiting for the recent revision of the APA's 1974 testing Standards to be completed before it seriously considered any revisions to the Uniform Guidelines. As it turns out, the 1985 edition of the APA Standards contains no major changes which have a direct effect on employee selection. While the new APA Standards do encourage the investigation of more than one aspect of validity for each test, this is an ideal, not an absolute requirement. Other major changes in the APA Standards were concerned primarily with testing applications in the clinical, counseling, and educational areas. Thus, I do not believe that any of the technical details of the Uniform Guidelines need to be revised to maintain compliance or consistency with the 1985 edition of the APA Standards.

The fact that there are no major changes in the 1985 APA Standards with regard to employee selection does not necessarily mean that the Uniform Guidelines should stand pat. As a regular Test Developer and occasional Test Reviewer who works with the Guidelines on a daily basis, I would recommend the following changes:

1. General coverage. The intent of the Uniform Guidelines is to provide one "uniform" federal policy for the development and use of employee selection procedures under federal EEO laws and other related laws, as appropriate. In 1978, the General Accounting Office conducted a study which identified 87 federal EEO laws under the enforcement of many different federal agencies. In a parallel study at the same time (Seberhagen, 1978), I discovered that there were at least 79 separate federal EEO laws and 15 different federal EEO enforcement agencies just for state and local government (see Appendix B). I also found that the Uniform Guidelines applied to only 50 percent (39/78, 1 N.A.) of the federal EEO laws and were used by only 33 percent (5/15) of the federal EEO enforcement agencies. I have not updated my 1978 study for 1985, but I do know that there are still some glaring omissions to the coverage of the Uniform Guidelines. Specifically, the Uniform Guidelines should be revised to cover:

- Age -- under Executive Order 11141 (1964) and the Age Discrimination in Employment Act of 1967, as amended.
- Handicap -- under the Rehabilitation Act of 1973, as amended.
- Veterans status -- under the Vietnam Era Veterans Readjustment Act of 1974.
- Other bases of discrimination -- under other federal law.

2. Other types of discrimination. The Uniform Guidelines deal primarily with the "adverse impact" type of discrimination and say little or nothing about "intentional discrimination" or "unequal treatment." As an expert witness in court, I have found that the issues of test "validity" and "professionally developed" selection procedures may be relevant to these other types of discrimination. Therefore, at a minimum, the Guidelines should say that the "validity" sections of the Guidelines represent federal policy whenever test "validity" or "professionally developed" selection procedures are at issue under federal law. Otherwise, there will continue to be no clear federal policy in EEO cases which do not involve adverse impact.

3. Adverse impact. The Guidelines rely on the "80% Rule" to measure possible adverse impact. This approach is very unreliable when the number of cases is small. A more scientific approach, consistent with professional standards and other sections of the Guidelines, would be to define "adverse impact" as a combination of:

- Statistical significance (at the .05 level of probability) to indicate whether a difference is merely due to chance; and
- The "80% Rule" to indicate whether the size of a difference is meaningful.

4. *Validation*. The *Guidelines* do not recognize the fact that discrimination can occur when there is no adverse impact. For example an employer could hire proportionately from Group "A" and Group "B" using valid tests for Group "A" and invalid tests for Group "B." This practice is discriminatory because the result would be a higher job failure rate for Group "B," possibly with greater risk to health and safety, as well as the creation of self-doubt and stereotypes of inferiority.

As another example, an employer could design selection procedures to ensure proportionate hiring for Group "A" and Group "B," even though the job applicants from Group "B" tended to have more of the skills needed to perform the job in question. This practice is discriminatory because the result would be unfair rejection of better qualified candidates from Group "B" to provide an artificial balance of employees from Group "A" and Group "B."

The only way to eliminate this kind of discrimination is to require the validation of all employee selection procedures. One approach would be simply to have the same standards for validation and documentation for all tests. Another approach would be to have two levels of standards, with higher standards for validation and documentation for those tests which have adverse impact. The idea that federal EEO guidelines should require all tests to be valid is not new. The 1968 testing *Order* of the Office of Federal Contract Compliance is an example of how this approach has been used in the past (see Appendix C).

5. *Job analysis*. The *Guidelines* should give greater recognition to the fact that job analysis is essential to the validity of all selection procedures, not just those based on content validity. Job analysis is necessary for:

- *Identification*. Job titles are unstandardized and often misleading. Therefore, a clear description of important tasks, necessary worker characteristics (e.g., knowledges, skills, and abilities), job context, and other relevant information is needed to show for what job (or jobs) the test is meant to be used.
- *Position classification*. Individual positions must be grouped together in reasonably homogeneous job classifications before test development and validation can begin. If the job class is heterogeneous (e.g., accountants and plumbers--or even accountants and bookkeepers--under the same job title), test development will be difficult and the validity of predictions, if any, could be uneven across positions within the job class.
- *Test development*. Job analysis is critical for the development of job sample tests and other content valid selection procedures. Job analysis is also helpful, if not necessary, for identifying likely predictors for criterion-related and construct valid selection procedures.

- Criterion development. Job analysis is necessary for the development and justification of measures of work performance or other criteria of job success (e.g., turnover, sales). For example, the adequacy of "sales" as a criterion measure would depend, at least in part, upon whether sales work was a major or minor function of the job in question.

- Test transportability. A complete description of the job or jobs included in the original validation research and the new job or jobs under consideration is necessary before validity may be generalized beyond the original validation research.

The importance of job analysis is reflected by the extensive professional literature on this topic, as shown by various reviews covering the period since 1910 (e.g., Bemis, Belenky, & Soder, 1983; McCormick, 1979; Prien & Ronan, 1971; Sparks, 1979; Zerga, 1943). There are many general methods of job analysis (e.g., literature review, interviews, observation, participation, worker logs, questionnaire surveys, examination of work products), and no one method is necessarily the best. The most important consideration is whether the job analysis method used has good measurement properties, such as:

- Effectiveness. Job analysis can be used for many purposes (e.g., selection, pay, training, reorganization). Whatever method is used should be designed to collect the information needed to meet the given objectives of the job analysis.

- Efficiency. The method should collect only that information needed to achieve the objectives of the job analysis, without collecting useless information or otherwise wasting valuable time, funds, or other resources.

- Validity. The method should provide job information that is accurate and complete, in accord with the objectives of the job analysis. A multi-method approach often works best to verify information obtained from different sources.

- Reliability. The method should provide job information in a consistent and precise manner, in accord with the objectives of the job analysis.

- Fairness. The method should provide job information at the same level of reliability and validity for each job incumbent, regardless of race, sex, age, or other personal characteristics.

- Utility. The benefits from using the method should outweigh its costs.

6. Validity generalization. When people speak of important recent developments in the field of employee selection, they probably have in mind the issue of "validity generalization." This issue is still so new and experimental that the 1985 edition of the APA testing Standards contained relatively little discussion of the subject and provided only two technical standards specific to this area (i.e., Standard 1.16 on meta-analysis and Standard 10.1 on test transportability).

In the context of employee selection, there are at least two models of validity generalization. These include:

- Meta-analysis, in which validation results are averaged over many studies, with statistical corrections, to obtain reliable estimates of the correlation between various types of predictors and various measures of job success.
- Test transportability, in which a test that has been validated for one location is considered valid for use in a second location if important conditions are substantially the same between the two locations (e.g., applicant pool, job duties, criterion of job success, test use).

On the basis of their meta-analyses of validation studies with cognitive ability tests (e.g., verbal and quantitative ability, perceptual speed, reasoning, spatial and mechanical ability), Frank Schmidt and Jack Hunter have concluded that: "Professionally developed cognitive ability tests are valid predictors of performance on the job and in training for all jobs...in all settings...." (Schmidt & Hunter, 1981). Some of their other related publications include: Hunter (1983); Hunter, Crosson, and Friedman (1985); Hunter and Hunter (1984); Schmidt and Hunter (1977); Schmidt, Hunter, and Pearlman (1981).

Schmidt and Hunter have found that cognitive ability tests are generally the best predictors of job success, with an average validity coefficient in the .50s (on a scale that ranges essentially from 0.00 to 1.00, where 0.00 is random selection and 1.00 is perfect prediction). One conclusion from this research might be that no further validation is needed, as long as an employer uses a cognitive ability test. I reject that conclusion for several reasons:

- Methods are still being defined. The development of the basic formulas and techniques of meta-analysis is an evolving process (Hirsh, Schmidt, Pearlman, & Hunter, 1985; Hunter, Schmidt, and Pearlman, 1982). Independent reviews of meta-analysis research (e.g., Bullock & Svyantek, 1985; Burke, 1984; Light & Pillemer, 1984; Orwin & Cordray, 1985) are also contributing to the development of these methods.

- Little replication has been done, and results are uncertain. For example, Hunter and Hunter (1984) conducted a meta-analysis which concluded that the average validity for training and experience (T&E) ratings was .13 for entry-level jobs. A later meta-analysis by McDaniel and Schmidt (1985a) concluded that the average validity ranged from .14 to .49, depending upon the type of T&E rating used. McDaniel and Schmidt (1985b) then reanalyzed their data and changed their conclusion slightly to estimate the average validity for T&E ratings at .13 to .63, depending on the type of T&E rating used.

- Cognitive ability may be necessary but not sufficient. A high validity coefficient for cognitive ability tests does not guarantee job success for applicants who score well on such tests. For many jobs, cognitive ability (or general intelligence) is necessary but not sufficient for job success. Other necessary worker characteristics may include job knowledge, physical ability, and personality. If the total selection process does not assess all necessary worker characteristics, a candidate could get a high score on the test and be a complete failure on the job. For example, cognitive ability tests would not be sufficient for hiring physicians, computer programmers, typists, firefighters, airline pilots, accountants, pro football players, or plumbers.

Validity generalization is an important area of research, but it would be premature to make radical changes in the Uniform Guidelines which would exempt employers from any further validation. Instead, the Guidelines should take a more reasonable and cautious approach by:

- Encouraging test transportability by providing more clarity on what evidence is needed to support this approach (e.g., complete validation study for original location, complete job analyses for both locations).

- Accepting meta-analyses only when the domain of studies is fully described and when the original studies are properly done, fully documented, and available for review.

- Requiring an analysis of the total selection process, supported by a detailed job analysis and other appropriate documentation, to show that all necessary worker characteristics are assessed in a proper way to ensure job success.

Closing

Thank you again for the opportunity to testify before the Subcommittee. I would be happy to answer any questions you have.

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APPENDIX

A. Test Utility: The Dollar Value of Employee Selection Procedures.

B. Federal EEO Laws Applicable to State and Local Government, 1978.

C. Office of Federal Contract Compliance Order on "Validation of Employment Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246," 1968.

TEST UTILITY: THE DOLLAR VALUE OF EMPLOYEE SELECTION PROCEDURES

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TABLE 1. BASIC CONCEPT OF TEST UTILITY: HYPOTHETICAL EXAMPLE

Work Quality	Dollar Value*	Percent Hired		Value x %Hired	
		No Test	With Test	No Test	With Test
Superior	$80,000/yr	10%	40%	$ 8,000	$32,000
Good	$60,000/yr	30%	50%	$18,000	$30,000
Marginal	$40,000/yr	40%	10%	$16,000	$ 4,000
Poor	$20,000/yr	20%	0%	$ 4,000	$ 0
Average Dollar Value of Each Employee Hired =				$46,000	$66,000

* Gross value of employee productivity, sales, or work performance.

GAIN: 1. $20,000/yr per employee hired ($66K vs. $46K).

2. $100,000 per employee hired, if 5 yr. average tenure.

3. $10 million/yr of test use, if hiring 100 employees per year.

GREATEST DOLLAR GAINS OCCUR WHEN:

1. Superior workers are worth much more than Poor workers.
2. Many employees are hired for the same job.
3. Employees tend to stay on the job for a long time.
4. The applicant pool contains a wide mixture of candidates, ranging from Poor to Superior.
5. The employer uses tests and other selection procedures which are most accurate in identifying the best workers.
6. The employer administers tests and other selection procedures correctly, according to the relevant test manual.
7. The employer selects candidates in rank order--from the top down, based on test scores.
8. Many applicants are tested, but only a few--the very best--are selected for employment.

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TABLE 2

FEDERAL LAWS WHICH PROHIBIT EMPLOYMENT DISCRIMINATION IN STATE AND LOCAL GOVERNMENT
(August 1978)

LEGAL AUTHORITY (In Chronological Order)	ENFORCEMENT AGENCY	PROTECTED CLASSES									
		Race	Color	Sex	National Origin	Creed/ Religion	Age	Handicap	Political Affiliation	Veteran	Other
Thirteenth Amendment (1865)		X	X	?	X	?	?	?	?	?	?
Fourteenth Amendment (1868)		X	X	X	X	X	X	X	X	X	X
Civil Rights Acts of 1866 & 1870		X	X	?	X	?	?	?	?	?	?
Civil Rights Act of 1871		X	X	X	X	X	X	X	X	X	X
Wagner-Peyser Act of 1933, as amended	Labor	X	X	X	X	X		X			
Social Security Act Amendments of 1939[a]	CSC	X		X	X	X	X	X	X		X
Federal Aid to Highways Act of 1958, as amended	Transportation			X							
Developmental Disabilities Services and Facilities Construction Act, as amended (1963)	HEW							X			
Equal Pay Act of 1963	Labor[b]			X							
Economic Opportunity Act of 1964, as amended	CSA	X	X	X	X	X			X		
Executive Order 11141 (1964)	GSA/DOD						X				
Title IV, Civil Rights Act of 1964, as amended	HEW	X	X	X	X	X					
Title VI, Civil Rights Act of 1964, as amended	Justice	X	X		X						
Title VII, Civil Rights Act of 1964, as amended	EEOC	X	X	X	X	X					
Title IX, Civil Rights Act of 1964, as amended	Justice	X	X	X	X	X					
Urban Mass Transit Act of 1964, as amended	Transportation			X							
Appalachian Regional Development Act of 1965, as amended	HEW/HUD Transportation			X							

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[a] Merit System Standards were first required by the Social Security Act Amendments but now apply to about 27 separate programs (see Table 3).

[b] The President's Reorganization Plan No. 1 of 1978 transfers this authority to EEOC in July 1979.

TABLE 2--Continued

LEGAL AUTHORITY (In Chronological Order)	ENFORCEMENT AGENCY	PROTECTED CLASSES									
		Race	Color	Sex	National Origin	Creed/ Religion	Age	Handicap	Political Affiliation	Veteran	Other
Executive Order 11246	Labor	X	X	X	X	X					
Title XII, Higher Education Act of 1965, as amended	HEW	X	X	X	X	X					
Age Discrimination in Employment Act of 1967, as amended	Labor[b]						X				
Omnibus Crime Control and Safe Streets Act of 1968, as amended	Justice	X	X	X	X	X					
Title I, Civil Rights Act of 1968	Justice	X	X		X	X					
Title VIII, Civil Rights Act of 1968, as amended	HUD	X	X	X	X	X					
Intergovernmental Personnel Act of 1970	CSC	X	X	X	X	X			X		
Comprehensive Health Manpower and Nurse Training Acts of 1971	HEW			X							
Public Works and Economic Development Act Amendments of 1971	Commerce			X							
Emergency School Aid Act of 1972, as amended	HEW	X									
State and Local Fiscal Assistance Act of 1972, as amended	Treasury	X	X	X	X	X	X	X			
Title IX, Education Amendments of 1972, as amended	HEW			X							
Water Pollution Control Act Amendments of 1972	EPA			X							
Apprenticeship Amendments of 1973	Labor	X	X	X	X	X					

TABLE 2--Continued

LEGAL AUTHORITY (In Chronological Order)	ENFORCEMENT AGENCY	PROTECTED CLASSES									
		Race	Color	Sex	National Origin	Creed/ Religion	Age	Handicap	Political Affiliation	Veteran	Other
Comprehensive Employment and Training Act of 1973, as amended	Labor/Justice	X	X	X	X	X	X	X	X		X
Domestic Volunteer Service Act of 1973	ACTION	X	X	X	X	X	X		X		
Health Programs Extension Act of 1973	HEW					X					
Section 503, Rehabilitation Act of 1973, as amended	Labor							X			
Section 504, Rehabilitation Act of 1973	HEW							X			
Disaster Relief Act of 1974	HUD	X	X	X	X	X	X				X
Energy Reorganization Act of 1974	Energy			X							
Equal Educational Opportunities Act of 1974	Justice	X	X	X	X						
Federal Energy Administration Act of 1974	Energy			X							
Housing and Community Development Act of 1974	HUD	X	X	X	X						
Juvenile Justice and Delinquency Prevention Act of 1974, as amended	Justice	X	X	X	X						
Vietnam Era Veterans Readjustment Act of 1974	Labor									X	
Age Discrimination Act of 1975	HEW						X				
Education for All Handicapped Children Act of 1975	HEW							X			
Headstart-Follow Through Act of 1975	HEW	X	X	X	X	X			X		

TABLE 2--Continued

LEGAL AUTHORITY (In Chronological Order)	ENFORCEMENT AGENCY	PROTECTED CLASSES									
		Race	Color	Sex	National Origin	Creed/ Religion	Age	Handicap	Political Affiliation	Veteran	Other
Act to Amend Title 18, U.S. Code (1976)	Justice	X	X	X	X	X			X		
Airport and Airway Development Act Amendments of 1976	Transportation	X	X	X	X	X					
Energy Conservation and Production Act (1976)	Justice/Energy	X	X	X	X						
Railroad Revitalization and Regulatory Reform Act of 1976	Transportation	X	X	X	X						
Title I, Public Works Employment Act of 1976, as amended	Commerce			X							
Title II, Public Works Employment Act of 1976, as amended	Treasury Justice	X	X	X	X	X	X	X			

TABLE 3

PROGRAMS WHICH REQUIRE PERSONNEL STANDARDS ON A MERIT BASIS

Program	Legislation
1. Old Age Assistance	Title I, Social Security Act, as amended by the Social Security Act Amendments of 1939.
2. Employment Security (unemployment insurance and employment service)	Title III, Social Security Act, as amended by the Social Security Act Amendments of 1939 and Wagner-Peyser Act, as amended.
3. Aid to Families with Dependent Children (AFDC)	Title IV-A, Social Security Act, as amended by the Social Security Act Amendments of 1939.
4. Maternal and Child Health Services/Crippled Children Services	Title V, Social Security Act, as amended by the Social Security Act Amendments of 1939.
5. Aid to the Blind	Title X, Social Security Act, as amended by the Social Security Act Amendments of 1939.
6. Aid to the Permanently and Totally Disabled	Title XIV, Social Security Act, as amended by the Social Security Act Amendments of 1950.
7. Aid to the Aged, Blind, or Disabled	Title XVI, Social Security Act, as amended by the Public Welfare Amendments of 1962.
8. Medical Assistance (Medicaid)	Title XIX, Social Security Act, as amended by the Social Security Amendments of 1965.
9. Grants to States for Social Services	Title XX, Social Security Act, as amended by the Social Services Amendments of 1974.
10. Civil Defense Personnel and Administrative Expenses	Title II, Civil Defense Act of 1950, as amended by P.L. 94-361.
11. State and Community Programs on Aging (Older Americans)	Title III, Older Americans Act of 1965, as amended by the Older Americans Comprehensive Services Amendments of 1973.
12. Nutrition Program for the Elderly	Title VII, Older Americans Act of 1965, as amended by P.L. 92-258.
13. Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation	Title III, Comprehensive Alcohol and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970.
14. Drug Abuse Prevention	Drug Abuse Office and Treatment Act of 1972.
15. National Health Planning and Resources Development	Title XV, Public Health Services Act, as amended by the National Health Planning and Resources Development Act of 1974.
16. Medical Facilities Assistance (Construction and Modernization	Title XVI, Public Health Services Act, as amended by the National Health Planning and Resources Development Act of 1974.
17. Developmental Disabilities Services and Facilities Construction	Developmental Disabilities Services and Facilities Construction Act, as amended by the Developmentally Disabled Assistance and Bill of Rights Act (1975).
18. Comprehensive Mental Health Services (Services and Facilities)	Title II, Community Mental Health Centers Act, as amended by the Community Mental Health Centers Amendments of 1975.
19. Food Stamps[a]	Food Stamp Act of 1964, as amended.
20. Occupational Safety and Health Standards[a]	Williams-Steiger Occupational Safety and Health Act of 1970.
21. Occupational Safety and Health Statistics[a]	Williams-Steiger Occupational Safety and Health Act of 1970.
22. Federal Property Assistance[a]	Federal Property and Administrative Service Act of 1949, as amended.
23. Child Welfare Services[a]	Title IV-B, Social Security Act, especially as amended by the Social Security Amendments of 1967.
24. Comprehensive Employment and Training[b]	Comprehensive Employment and Training Act of 1973.
25. Vocational Rehabilitation Services[b]	Title I, Rehabilitation Act of 1973, as amended.
26. Disability Determination Services[b]	Titles II and XVI, Social Security Act, as amended.
27. Health Insurance for the Aged (Medicare)[b]	Title XVIII, Social Security Act, especially as amended by the Health Insurance for the Aged Act (1965).

SOURCE: Federal Register, 1976, 41, 52477-52478.

[a] Merit system standards are required by regulations.

[b] Legislation contains personnel requirements which may be satisfied by the merit system standards.

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PART II

DEPARTMENT OF LABOR

Office of the Secretary

Validation of Employment Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

DEPARTMENT OF LABOR

Office of the Secretary

EMPLOYMENT TESTS BY CONTRACTORS AND SUBCONTRACTORS

Validation

Validation of employment tests by contractors and subcontractors subject to the provisions of Executive Order 11246.

1. *General.* (a) The following order regarding the use of employment tests by contractors subject to the provisions of Executive Order 11246 is being issued in response to numerous requests for policy guidance by Government agencies and by contractors.

(b) Two matters regarding selection procedures are of foremost concern to the Government: (1) Recognizing the importance of proper procedures in the utilization and conservation of human resources generally, and (2) pointing out the possible adverse effects of improper procedures on the utilization of minority group personnel.

(c) The order is founded on the belief that properly validated and standardized tests, by virtue of their relative objectivity and freedom from the biases that are apt to characterize more subjective evaluation techniques, can contribute substantially to the implementation of equitable and nondiscriminatory personnel policies. Moreover, professionally developed tests, carefully used in conjunction with other tools of personnel assessment and complemented by sound programs of training and job design, can significantly aid in the development and maintenance of an efficient work force.

(d) An examination by the Office of Federal Contract Compliance of compliance reviews of contractors has affirmed the increasing reliance on tests in the conduct of personnel activities. In many cases contractors have come to rely almost exclusively on tests as the basis for making employment and promotion decisions, with candidates sometimes selected or rejected on the basis of a single test score. The examination also disclosed that where employment tests are so used, minority candidates frequently experience disproportionately high rates of rejection through failing to attain score levels that have been established as minimum standards for qualification.

(e) The examination further suggests that there has been a decided increase since 1963 in total test usage and a particularly notable increase in the incidence of doubtful testing practices which experience indicates, tend to have racially discriminatory effects. These findings are particularly evident in testing programs related to blue-collar and clerical job categories.

(f) It has become clear that in many instances contractors are using tests to determine qualification for hire, transfer, or promotion without evidence that they are valid indices of performance potential. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking validity (i.e., having no significant relationship to job behavior) and yielding lower scores for minority candidates may resultantly reject many who have probabilities of successful work performance equal to those of nonminority candidates.

(g) The order that follows, dealing with basic issues of validity and fairness in those selection programs in which blue-collar and clerical job categories are primarily involved, was developed only after extensive discussions of the many complex problems and technical considerations with test experts and personnel management specialists from both academia and industry. The provisions of the order are designed to serve as a workable set of criteria for agencies and contractors in determining whether or not selection practices are in compliance with Executive Order 11246.

It is recognized that the tests used by the State Employment Agencies should be similarly validated, and it is expected that the U.S. Employment Service will expand, as necessary, its test validation program for State Agencies.

It is also recognized that test usage, as well as test validity, must be reviewed to determine its effect on the employment of minorities. For example, a test may be suspect when it is given in a language in which a significant number of minority applicants are not proficient and where language proficiency itself is not a bona fide requirement for the job. Similarly, a test or other qualification standard should not be used in a situation involving the transfer or promotion of minority employees when such employees would already have occupied the positions involved without such qualifications were it not for past discriminatory practices.

Specific directives concerning test usage will be issued by the Office of Federal Contract Compliance within a short time.

2. *Evidence of validity.* (a) It is directed that each agency require each contractor regularly using tests to select from among candidates for hire, transfer or promotion to jobs other than professional, technical and managerial occupations (defined as occupational groups "O" and "1" in the "Dictionary of Occupational Titles," Third Ed.) to have available for inspection, within a reasonable time, evidence that the tests are valid for their intended purposes. Such evidence shall be examined in compliance reviews for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates.

(b) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job(s) for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that a new employee will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. In the latter case, it would be appropriate for a contractor to institute performance or other tests as a condition of promotion provided such tests also have been validated pursuant to the provisions of this order.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may also suffice for the other. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required.

3. *Minimum standards for validation.* For the purpose of satisfying this order, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in the American Psychological Association's "Standards for Education and Psychological Tests and Manuals." (Evidence of content or construct validity may also be appropriate where criterion-related validity is not technically feasible, but it should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content in the case of job knowledge or proficiency tests or the construct in the case of trait measures.) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards must be met by any approach used so far as applicable:

(1) Where a predictive validity study is conducted, the sample of subjects must be representative of the normal or typical candidate group for the job(s) in question. Where a concurrent validity study is conducted, the sample should be, so far as technically feasible, representative of the minority groups currently included in the candidate population.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards employed to protect the security of test scores and insure that scores do not enter into any judgments of individual adequacy that are to be used as criterion measures.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance, and tenure. In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques

should be developed carefully and the ratings themselves examined closely for evidence of bias. Whatever criteria are used, however, they should represent major or critical work behaviors as revealed by careful job analyses.

(4) Presentations of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior.

(5) Data must be generated and results reported separately for minority and nonminority groups wherever technically feasible.

4. *U.S. employment service validation.* Compliance with this order shall be the responsibility of the contractor; however, where testing services of a State Employment Agency are used, the following rules shall apply:

(1) In cases where a contractor uses the testing services of a State Employment Service Office, and the tests used by the State Office have been validated pursuant to the requirements of this order, the employer shall have on file the U.S. Employment Service certification of this fact, which shall be accepted as compliance with this order. (If further tests are required by the contractor, he remains responsible for determination of the validity of such further tests.)

(2) In cases where a contractor uses the testing services of a State Employment Service Office and the tests used by the State Office have not been validated for particular jobs pursuant to the requirements of this order, the contractor shall, as a condition for future use, cooperate with the State Office to effect validation of tests as they relate to job requirements of the contractor.

5. *Use of validity studies.* In cases where the validity of a test cannot be determined pursuant to section 3 above (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity.

6. *Assumptions of validity.* (a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers or users; and other nonempirically based and anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

7. *Continued use of tests.* Under certain conditions, a contractor may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, evidence of criterion-related validity in a specific setting is technically feasible and required but not yet obtained, the use of the test may continue *Provided:* (a) The contractor can cite substantial evidence of validity as described in section 5 above, and (b) he has in progress, validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the contractor will use cut-off scores which yield score ranges broad enough to permit the identification of criterion-related validity.

8. *Affirmative action.* Nothing in this order shall be interpreted as diminishing a contractor's obligation to undertake affirmative action to ensure that applicants and current employees are treated without regard to race, creed, color or national origin. Specifically, the use of tests which have been validated pursuant to this order does not relieve the contractor of his obligation to take positive and affirmative action in affording employment and training to minority group personnel.

9. *Definition of "test."* For the purpose of this order, "test" is defined as any paper-and-pencil or performance measure used to judge qualifications for hire, transfer or promotion. This definition includes, but is not restricted to, measures of general intelligence, mental ability, and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; knowledge and proficiency; occupational and other interests; and personality or temperament.

10. *Other selection techniques.* Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored interviews, unscored application forms, and records of educational and work history. Where there are data suggesting that such unfair discrimination exists (e.g., differential rates of rejecting applicants from different ethnic groups or disproportionate representation of some ethnic groups in employment in certain classes of jobs), then the contractor may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in sections 2 and 3. If the contractor is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of unfair discrimination.

11. *Compliance review.* (a) Contractor practices in the use of employment tests and other selection techniques as qualification standards should be examined carefully for possible noncompliance with the requirements of Executive Order 11246 when:

(1) There is a lack of evidence of test validity, but the contractor continues to use test scores as a basis for personnel decisions; or,

(2) The contractor is unwilling to conduct test validation studies, when such studies are technically feasible, or otherwise provide evidence of validity as a requirement for continued test usage; or,

(3) When other selection techniques are used as identified in section 10 above, and there is information suggesting unfair discrimination in employment of minority groups, and the contractor refuses to validate these techniques or to eliminate the conditions suggestive of unfair discrimination.

(b) A determination on noncompliance pursuant to the provisions of this order shall be grounds for the imposition of sanctions under Executive Order 11246.

(c) The use by a contractor of tests or other selection techniques for which there is evidence of unfair discrimination or differential validity patterns for minority and nonminority groups, and no adjustment has been made for this finding, shall be grounds for the imposition of sanctions under Executive Order 11246.

12. *Exemptions.* (a) Requests for exemptions from this order or any part thereof must be made in writing, with justification, to the Director, Office of Federal Contract Compliance, Washington, D.C., and shall be forwarded through and with the endorsement of the agency head.

(b) The provisions set forth above shall not apply to any contract when the head of the contracting agency determines that such contract is essential to the national security. Upon making such a determination, the agency head will notify the Director, in writing, within 30 days.

13. *Agency implementation program.* (a) Each agency shall, within 90 days of the date of this order, submit a program to implement this order. The program shall include the establishment of priorities for enforcement that meet the following criteria: Reviews of the selection programs of—

(1) Contractors employing 2,500 or more beginning 6 months from the date of this order;

(2) Contractors employing 1,000 or more beginning 1 year from the date of this order;

(3) All other contractors beginning 18 months from the date of this order.

(b) Notwithstanding subsection (a) of this section, each agency shall identify from agency files of compliance reviews or complaints those files which indicate a probability of the use of tests and other selection techniques not in accordance with the provisions of this order.

(c) The agency shall after such identification and consultation with the Office of Federal Contract Compliance, inform the contractor of the possible violation of the order and ask for a written program to be submitted within 30 days that will conform to the order.

(d) Each agency shall assign responsibility for compliance with this order at Headquarters level and furnish the name of the assigned officer to the Office of Federal Contract Compliance.

(e) Each contracting and administering agency shall issue the following instructions to field personnel concerning procedures to be adopted on investigations under this order:

(1) The investigator will make only a determination of facts from the company records and appropriate interviews with management.

(2) He will carefully document the effect of the current selection program on minority applicants and employees.

(3) He will inquire as to whether validation studies have been completed for any tests being used. If the contractor's answer is affirmative, the investigator will obtain copies of the validation studies to include in the report.

(4) With respect to other selection techniques as discussed in section 10, if information suggests the existence of unfair discrimination against minority groups, we will inquire as to whether validation studies have been completed for these techniques. If the contractor's answer is affirmative, the investigator will obtain copies of the validation studies to include in the report. If the answer is negative, he will inquire as to whether such validation studies are being undertaken or, if not, what measures the contractor contemplates to eliminate the conditions suggestive of unfair discrimination.

14. *Effect of this order on other rules and regulations.* (a) All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are superseded to the extent that they are inconsistent herewith.

(b) Nothing in this order shall be interpreted to diminish the present contract compliance review and complaint investigation programs.

15. *Authority.* (a) General: Executive Order 11246, dated September 24, 1965, and Secretary's Order No. 26-65, dated October 5, 1965 (31 F.R. 6921).

(b) Specific:

(1) Part II, Subpart C, section 205 of Executive Order 11246.

(2) Part II, Subpart C, section 206 (a) and (b) of Executive Order 11246.

(3) Part III, section 301 of Executive Order 11246.

(4) Part III, section 303 (a) and (b) of Executive Order 11246.

(5) Part IV, section 403(b) of Executive Order 11246.

16. *Effective date.* This order shall be effective immediately.

Signed at Washington, D.C., this 9th day of September 1968.

WILLARD WIRTZ,
Secretary of Labor.

[F.R. Doc. 68-11487; Filed, Sept. 23, 1968; 8:48 a.m.]

Mr. MARTINEZ. Thank you, Dr. Seberhagen, you have made some very valid suggestions. I would think that maybe your testimony ought to go to the Chairman of the Commission and the Commissioners.

Mr. Hayes.

Mr. HAYES. Mr. Chairman, I share your opinion. Each of the witnesses' testimony has been well documented. I really don't have any questions. They both seem to subscribe to the philosophy of, if it's not broke, don't fix it. Is that right?

Mr. SEBERHAGEN. Yes.

Mr. HAYES. And if you can't improve it, leave it alone. Is that right?

Mr. SEBERHAGEN. Yes.

Mr. HAYES. Thank you.

Mr. MARTINEZ. I just have one thing. As both of you were talking, it came to me that it still persists in some people's minds that the country as a whole has not really been hurt by discrimination that has persisted over decades. I thought, if these artificial barriers that have existed for all of these decades for minorities hadn't existed—wouldn't we all have been better off if they had been lifted and these people had been allowed to be predictive assets rather than liabilities? I would think you would agree with me that the answer would be yes.

Mr. SEBERHAGEN. Absolutely.

Mr. BURNS. Yes.

Mr. MARTINEZ. I thank you very much for bearing with us and being patient enough in accepting the role as last witnesses, your testimony was no less important to us than the rest. Thank you very much.

Mr. BURNS. Thank you, Mr. Chairman.

Mr. SEBERHAGEN. Thank you.

[Additional material submitted for the record follows:]

CHADBOURNE, PARKE, WHITESIDE & WOLF,
Washington, DC, September 24, 1985.

Hon. MATTHEW G. MARTINEZ,
Chairman, Subcommittee on Employment Opportunities, Committee on Education and Labor, Washington, DC.

DEAR MR. CHAIRMAN: I regret to inform you that I will not be able to testify at the Oversight Hearing on EEOC's proposed changes in enforcement policies on October 2, 1985. For sometime now I have been scheduled to be in Denver during that period.

However, I have enclosed a statement on the subject of proposed changes to the Uniform Guidelines on Employee Selection Procedures which I ask that you incorporate in the Record.

I hope this information is useful to you and if I can be of further assistance, please let me know.

Sincerely,

DANIEL E. LEACH.

PREPARED STATEMENT OF DANIEL E. LEACH

Mr. Chairman and members of the Subcommittee my name is Daniel E. Leach. I am an attorney and represent employers with regard to employment discrimination matters, affirmative action and the various employment issues that arise under civil rights laws. For the four year period of the previous administration, I served as the Vice Chairman of the United State Equal Employment Opportunity Commission.

I regret that I am unable to personally appear before the Subcommittee due to a long standing commitment. However, I appreciate the invitation and welcome the opportunity to address the issue of anticipated changes in the Uniform Guidelines on Employee Selection Procedures pursuant to the review currently underway.

First, the Employer community welcomes guidance which, if followed, serves to help mitigate or avoid liability. In that regard it is of interest that the Equal Employment Opportunity Commission is now in the process of reviewing and revising "the premises" of the Uniform Guidelines on Employee Selection Procedures ("Guidelines").[1]

To be sure there are issues raised by the Guidelines which warrant revision—issues involving recordkeeping (those requirements should be streamlined); the portability of tests (the standards could perhaps be revamped to permit a wider utilization of already validated procedures); and the so-called 4/5's rule (there are other statistical formulae indicating exclusionary effects which have equal if not greater legal significance). Thus, such a review is warranted. It is warranted so long as it recognizes the solid legal premises on which the Guidelines are based as expressed in *Griggs* v. *Duke Power Co.*, 40 U.S. 424 (1971). The Supreme Court there endorsed the fundamental premises of the Guidelines—the playing field must be level when it comes to choosing people for jobs:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. . . . The Act proscribes not only overt discrimination but also practices that are *fair in form but discriminatory in operation*, 401 U.S. at 431. [Emphasis supplied.] Thus, in the review process now underway, it is important that the government reaffirm such a compelling underpinning of legal support.

It is equally important that this form of guidance continue to serve employers with a credible roadmap when seeking to make legally informed decisions about "procedures or tests [which although] neutral on their face . . . operate to 'freeze' the status quo of prior discriminatory employment practices." The Supreme Court has ruled such measures unlawful. "The Guidelines" (the Court explained in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)) "aid employers in determining, through professional validation studies, whether their employment tests are job related. 29 CFR Part 1607." The Court noted: "These Guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association." [Citing by footnote the relevant American Psychological Association Standard.] 422 U.S. at 430-431.

Finally, the reliability of the Guidelines was underscored by the Court as "[t]he administrative interpretation of the Act by the enforcing agency; and consequently . . . they are 'entitiled to great deference.' " 422 U.S. at 431 (quoting) *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971), on remand, 6 FEP 7 (N.D.N.C. 1972). It is also significant that few cases today involve Guideline related issues; a factor which must be construed as strong evidence that the Guidelines have been of credible assistance to large segments of the employer community.

Some years ago, the Guidelines were attacked by a few individuals familiar with employment tests who sought to re-write Title VII history. The argument was raised that "all cognitive ability tests" were valid for all jobs, "regardless of job level or complexity."[2] This thesis, never accepted by the professional community, was largely put to rest by pointing our that in enacting Title VII, Congress was aware that some employers utilized legitimate, job-related selection procedures to screen applicants. Because these instruments were essential in measuring the job suitability of particular individuals, Congress provided (in section 703(h)) that it would not be "an unlawful employment practice of employers" to predicate selection decisions on the results of any professionally developed ability test." Even in 1964, however, Congress (and many employers) recognized that not all tests were valid for all jobs, and therefore, qualified its approval of the use of tests by the proviso that "such tests[s] . . . not [be] designed, intended or *used* discriminate because of race, color, religion, sex or national origin." Responding to this Congressional mandate, in 1966 the EEOC began publishing Guidelines interpreting "professionally developed ability tests" to refer only to those tests which "fairly measure the knowledge or skills required by the particular job." This guideline was revised in 1970 to address the importance of validating as job related, tests used to screen job applicants where these selection instruments had an exclusionary effect.[3]

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[1] 29 CFR 1607. *See Daily Labor Report* June 7, 1985 (No. 110) at pp. 3-4 (June 7, 1985).

[2] BNA-DLR, 48, 3/13/81, p. A-5. Speech before the ABA Committee on Development of EEC Law, Sarasota, Florida, March 1981.

[3] 35 Fed. Reg. 12333 (August 19, 1970).

In 1971, a unanimous Supreme Court in the *Griggs* case applied the Guidelines and struck down an employer's high school diploma and paper and pencil cognitive ability test because they not only (i) screened out a disproportionate number of blacks but (ii) could not be shown to have a relation to the job or to how one might actually perform on the job.

The Guidelines have subsequently been amended to reflect the caselaw development with respect to job selection and validation. In 1978, the Guidelines as they now apply were published jointly by four enforcement agencies—the EEOC, OFCCP, Department of Justice and the then-Civil Service Commission. Questions and Answers of an advisory nature were later appended.

Courts have since routinely relied on the Guidelines and, as noted, while refinements in certain areas may be appropriate, it would be unfortunate for the government to deviate significantly from their original premises—subsequently affirmed by Congress, the Courts and the testing profession. The American Psycological Association has consistently embraced the Guidelines.[4] Against this background, employers should also be cognizant of the Supreme Court's reminder in *General Electric Co.* v. *Gilbert*,[5] that it will decline "to follow administrative Guidelines . . . where they conflict with earlier pronouncements of the agency."

Thus, until Congress, the courts or the clear weight of proven theoretical developments dictate a fundamental overhaul, the employer community should continue to have the benefit of Guidelines on which they can rely. Employers need certainty that conformance will provide a degree of insulation from liability exposure when challenged in a court of law. The government must keep this legal reality squarely before it when recommending any changes based on the current review.

[Whereupon, at 1:30 p.m., the subcommittee adjourned.]

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[4] Letter from the American Psychological Association, Committee on Psychological Tests and Assessments, to Executive Director of the EEOC, February 11, 1980.

[5] 429 U.S. 125, 12 EPD TD 11,240 at 5741.